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Record No. 5084

In the Supreme Court of Appeals of Virginia at Richmond

HAYES RICHLANDS METAL PRODUCTS, INC., ET AL.

v.

J. E. HONAKER

FROM THE CIRCUIT COURT OF TAZEWELL COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5084

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 8th day of October, 1959.

HAYES RICHLANDS METAL PRODUCTS, INC., ET AL.,
Plaintiffs in Error,

against

J. E. HONAKER, Defendant in Error.

From the Circuit Court of Tazewell County

Upon the petition of Hayes Richlands Metal Products, Incorporated, and Charles Mundy a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Tazewell County on the 13th day of April, 1959, in a certain motion for judgment then therein depending wherein J. E. Honaker was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of eight thousand dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Clerk's Office the 27th day of Aug., 1958.

Teste:

H. ELMER KISER, Clerk
By ELIZABETH BELEW, D. C.

MOTION FOR JUDGMENT.

(1) On or about the 2nd day of September, 1956, the plaintiff was the owner of and was driving that certain automobile namely, a 1955 Model Pontiac Catilina and was so operating said automobile in a westerly direction upon U. S. Highway No. 460 in and near the east end of the Town of Richlands, in Tazewell County, Virginia.

(2) At said time and place Hayes Richlands Metal Products, Incorporated, a corporation, through its agent, servant and employee, Charles Mundy, and the said Charles Mundy were operating a certain motor truck in an easterly direction upon said highway.

(3) The said Hayes Richlands Metal Products, Incorporated, a corporation, through its said agent, servant and employee, Charles Mundy, and the said Charles Mundy did carelessly, negligently and unlawfully drive and operate said motor vehicle from the right or south traffic lane of said highway, over and across the center line of said highway, and over and across the north traffic lane of said highway in such manner and under such circumstances as to obstruct the traffic lane of said highway over which the automobile belonging to and driven by the plaintiff was lawfully entitled to use, and in such manner and under such circumstances as to cause said automobile belonging to the plaintiff to run into and collide with said motor truck being then and there carelessly, negligently and unlawfully operated by defendants as aforesaid.

(4) By reason of, and as the direct and proximate result of the aforesaid unlawful, careless and negligent acts
page 2 } of the said defendants in causing said collision as aforesaid, the plaintiff suffered great and serious bodily injuries, including a fracture of his pelvis and was otherwise greatly bruised, mangled and wounded in and about his neck, head, arms, body and legs and he was otherwise cut, bruised, lacerated and injured in such manner that he is permanently injured and will remain permanently injured

and disabled the remainder of his natural life and that in addition thereto, the said plaintiff has suffered great shock to his nervous system, from all of which he suffered great pain and mental anguish, and will continue to suffer great pain and mental anguish.

(5) As a result of said injuries, plaintiff was confined to a hospital for many weeks and has incurred and become liable for medical treatments, doctors', hospital and nurses' bills in the sum of approximately One Thousand Five Hundred Dollars ($1,500.00) in endeavoring to be cured of his said injuries.

(6) The injuries hereinabove set forth have resulted in severe and permanent injuries which will continue to cause the plaintiff to suffer great physical pain and mental anguish, and will greatly diminish the plaintiff's ability to earn a livelihood.

(7) By reason of and as the direct and proximate result of the aforesaid unlawful, careless and negligent acts of the said defendants in causing said collision as aforesaid, the said 1955 Model Pontiac Catilina was damaged in the sum of approximately One Thousand Eight Hundred Forty Nine Dollars ($1,849.00).

WHEREFORE, the undersigned plaintiff moves this Honorable Court for judgment against the said defendants, and each of them, in the sum of Fifty Thousand Dollars ($50,000.00), and the costs of this action.

page 3 }

J. E. HONAKER, Plaintiff
By J. P. PROFFITT, JR., p. q.
Counsel.

J. P. PROFFITT, JR., p. q.
Tazewell, Virginia.

* * * * *

page 18 }

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Dec. 15, 1958.

Teste:

R. P. HAWKINS, Deputy Clerk.

AFFIDAVIT PURSUANT TO §8-115, CODE OF VIRGINIA.

Commonwealth of Virginia,
County of Tazewell, to-wit:

This day, in the County of Tazewell, G. H. COX personally appeared before me, Estaa M. Hess, a Notary Public for the County aforesaid, in the Commonwealth of Virginia, and made oath that he is Office Manager of HAYES RICHLANDS METAL PRODUCTS, INCORPORATED, one of the parties defendant in the above styled cause, now pending in the Circuit Court of Tazewell County, Virginia; that on the 2nd day of September, 1956, the motor truck described in the motion for judgment, and allegedly operated by one Charles Mundy, was not owned, operated, or controlled, in any way, whatsoever, by HAYES RICHLANDS METAL PRODUCTS, INCORPORATED, nor by or through any agent, servant or employee of HAYES RICHLANDS METAL PRODUCTS, INCORPORATED.

G. H. COX.

Subscribed and sworn to before me, in my said County, this 15th day of December, 1958. In testimony whereof I have hereunto set my hand the day, month and year aforesaid.

ESTAA M. HESS
Notary Public.

My commission expires 17 September, 1961.

page 19 } I hereby certify that I have this day mailed a copy of the foregoing Affidavit to J. P. Proffitt, Jr., Esquire, Tazewell, Virginia, and Carl C. Gillespie, Esquire, Tazewell, Virginia, Counsel for the plaintiff, and to Charles Mundy, this 15th day of December, 1958.

T. G. SHUFFLEBARGER
Of Counsel for
HAYES RICHLANDS METAL
PRODUCTS, INCORPORATED.

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page 20 }

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Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Dec. 15, 1958.

Teste:

R. P. HAWKINS, Deputy Clerk.

ANSWER & GROUNDS OF DEFENSE OF HAYES RICHLANDS METAL PRODUCTS, INCORPORATED.

The Answer and Grounds of Defense of Hayes Richlands Metal Products, Incorporated, to the Motion for Judgment heretofore filed against it and Charles Mundy in the Circuit Court of Tazewell County, Virginia:

In this Answer and Grounds of Defense, the truck driven by Charles Mundy at the time of collision will be referred to as the motor truck, and the automobile then driven by plaintiff will be referred to as the automobile.

(1) This defendants says that it is true that, at the time of the alleged collision, on or about September 2, 1956, the plaintiff was driving a certain automobile in a westerly direction on U. S. Highway No. 460 near the east end of the Town of Richlands, in Tazewell County, Virginia, but this defendant denies that at the time of the said accident and collision referred to, it was operating a motor truck by its agent, servant and employee, Charles Mundy, and says that, while said Charles Mundy was at said time one of the employees of this defendant, he was not acting as the agent or servant of this said defendant, nor in or about its business, nor in the course of his employment by it, in the operation of said truck at that time. This defendant denies that, at the time in question, on or about September 2, 1956, it, through its agent, servant or employee, Charles Mundy, drove and operated the motor truck, and says that, while the said Charles Mundy page 21 } was then one of the employees of this defendant, he was not acting for it, nor in the course of his employment by it at said time, and as to said operation of said motor truck he was not the agent, servant or employee of this defendant, nor is this defendant liable for any act or omission, if any, of him.

(2) This defendant says that, from information derived from others, it believes that said Charles Mundy was, on the occasion in question, operating a motor truck at the time and place alleged, but it denies that he then carelessly, negli-

gently or unlawfully drove and operated said motor truck from the right or south traffic lane of said highway over and across the north traffic lane in such manner and under such circumstances as to unlawfully or wrongfully obstruct the traffic lane of said highway which the automobile driven by plaintiff was entitled to use, in such manner and under such circumstances as to cause said automobile then driven by plaintiff to run into and collide with the motor truck then and there alleged to have been carelessly, negligently and unlawfully driven by the defendant, Charles Mundy, and this defendant says that, save and except only the allegation that said motor truck at said time was being operated by said Charles Mundy, each and every allegation of Paragraph No. "(3)" of plaintiff's motion for judgment is incorrect and untrue.

(3) This defendant is informed and believes, and alleges and avers, that at the time of and immediately preceding the collision between the automobile and motor truck, the said Charles Mundy was driving and operating said motor truck on and along said highway in an easterly direction in a proper and lawful manner and in the exercise of due care, with the purpose of taking and in an effort to take said motor truck to the C & S Service Station, which was located on the north side of said highway, and that said Charles Mundy, after having observed and performed and kept and while observing, performing and keeping all of the requirements of the law to entitle him to cross said highway and the north lane thereof and to give him priority, in such attempt to cross and in said crossing, over traffic approaching said page 22 } crossing upon said highway from the east, including the automobile driven by said plaintiff, and in the reasonable and *bona fide* belief that he could make said crossing safely, said Charles Mundy drove said motor truck across said highway to the entrance of the aforesaid service station, situate on the north side of said highway, in a careful and proper and lawful manner, as aforesaid, and in such manner as to give him lawful priority over said automobile then being driven by said plaintiff, in the use of said highway and the north lane thereof in making said crossing. And this said defendant further says that the said automobile driven by plaintiff came up to the top of an elevation and around a curve at a distance of more than 550 feet east of the place where said Charles Mundy was then crossing said highway, and then and thereafter the said plaintiff had a clear and unobstructed view at all times of said motor truck in making

said crossing, and then and thereafter at all times saw or could and should have seen the signal of said motor truck for a crossing of said highway to the entrance of said service station; and the said plaintiff then and thereafter did not reduce his speed and did not bring his automobile under control, but recklessly, negligently and unlawfully drove said automobile, at an unlawful, dangerous and grossly negligent rate of speed and in an unlawful, reckless and grossly negligent manner, and with great force and violence, into and against the motor truck as it was crossing said highway and on and to the north side of said highway, and on and to the north of said highway, and thereby the said plaintiff recklessly, negligently and unlawfully caused the said collision and the consequent alleged injury and damage resulting therefrom, all of which were the proximate result of the wrongs and negligent and reckless and unlawful acts and conduct of the said plaintiff and not to any extent the proximate result of any unlawful, negligent or wrongful act or omission of the said Charles Mundy.

(4) And this said defendant says that it does not know as to whether or not the plaintiff sustained the bodily injuries alleged in his Motion for Judgment, or any bodily injuries, and it does not admit same, and it does not page 23 } know and does not admit the alleged character of or extent of said alleged injuries or the results or alleged permanency therof, and it does not know that plaintiff expended the amounts alleged to have been expended, or any amount, for medical attention and nursing services; and this defendant does not know as to the alleged damage to the automobile, allegedly owned by the plaintiff, by reason of the aforesaid collision, nor does it know that said automobile was damaged to any extent, and this defendant does not admit the truth of any of said allegations.

(5) This defendant here denies each and every allegation of the aforementioned Motion for Judgment not herein expressly admitted or expressly denied. It denies that plaintiff was injured as the proximate result of any alleged negligence of the said Charles Mundy; and further denies any liability upon its part even if said alleged injuries were the proximate result of the alleged negligence of the said Charles Mundy. It denies the alleged injuries and the alleged nature, extent and the character of said alleged injuries, and likewise denies the alleged damage to the automobile; it denies that it is indebted or liable to the said plaintiff in the sum of $50,000.00,

or in any amount, and prays that it be hence dismissed with its costs in this behalf expended.

HAYES RICHLANDS METAL
PRODUCTS, INCORPORATED
By T. G. SHUFFLEBARGER
Of Counsel.

A. G. LIVELY,
Attorney at Law,
Lebanon, Virginia.

T. G. SHUFFLEBARGER,
Attorney at Law
Richlands, Virginia.

Counsel for Hayes Richlands Metal Products, Incorporated.

I, T. G. Shufflebarger, do hereby certify that I have this day mailed a copy of the foregoing pleading to J. P. Proffitt, Jr., Esquire, Attorney at Law, Tazewell, Virginia, and to Carl C. Gillespie, Esquire, Attorney at Law, Tazewell, Virginia, attorneys for the plaintiff, and also a copy thereof to Charles Mundy, the other defendant, this 15th day of December, 1958.

T. G. SHUFFLEBARGER
Of Counsel for defendant,
Hayes Richlands Metal Products,
Incorporated.

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* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Dec. 16, 1958.

Teste:

ELIZABETH BELEW, Deputy Clerk.

GROUNDS OF DEFENSE OF CHARLES MUNDY.

The grounds of defense of Charles Mundy to the Motion for Judgment against him and another in the captioned cause,

now pending in the Circuit Court of Tazewell County, Virginia:

(1) This defendant denies that he was guilty of operating the truck in question in a careless, negligent and unlawful manner, and asserts that he was guilty of no negligence in connection with the accident mentioned in the Motion for Judgment.

(2) This defendant alleges that any injuries suffered by the plaintiff were caused by the recklessness, carelessness, negligence and the excessive and unlawful speed of the said plaintiff in the operation of his automobile immediately prior to and at the time of the collision.

(3) This defendant alleges that the said recklessness, carelessness, negligence and excessive and unlawful speed of the said plaintiff were the sole cause or causes of the automobile belonging to the plaintiff running into and colliding with the truck then and there operated by this defendant.

page 25 } (4) This defendant asserts that if he were guilty of any negligence in the operation of the truck in question, which he emphatically denies, the plaintiff, J. E. Honaker, was guilty of contributory negligence in causing the accident between the said truck operated by this defendant and the automobile operated by the plaintiff, and that, by reason of such contributory negligence, the said plaintiff is not entitled to recover for his alleged injuries.

(5) That this defendant denies that he is indebted or liable to the plaintiff in the sum of $50,000.00, or in any amount.

(6) That this defendant denies all the other allegations of said Motion for Judgment which are not herein specifically admitted or denied, and prays to be hence dismissed with his costs in this behalf expended.

CHARLES MUNDY.

I, Charles Mundy, one of the defendants in this action, do hereby certify that I have this day mailed a copy of the foregoing pleading to J. P. Proffitt, Jr., Attorney at Law, Tazewell, Virginia, and Carl C. Gillespie, Attorney at Law, Tazewell, Virginia, attorneys for the plaintiff, and to T. G. Shufflebarger, Attorney at Law, Richlands, Virginia, and A. G. Lively, Attorney at Law, Lebanon, Virginia, attorneys of record for the defendant, Hayes Richlands Metal Products, Incorporated, this 15th day of December, 1958.

CHARLES MUNDY.

* * * * *

page 30 } INSTRUCTION NO. 1-A.

The Court instructs the jury that the law required the defendant, Charles Mundy, before making a left-hand turn from a direct line, to use reasonable and ordinary care to first see that such movement could be made in safety, and if you believe from a preponderance of the evidence in this case that the said Mundy failed to do so, and that such failure on his part was the sole proximate cause of the accident, and that said Mundy was at the time the agent of Hayes Richlands Metal Products, Inc., then your verdict should be for the plaintiff.

Given 3-11-59.

V. L. S., JR., Judge.

page 31 } INSTRUCTION NO. 2.

The Court instructs the jury that if you believe from a preponderance of the evidence in this case that the defendant, Charles Mundy, was not keeping a reasonable lookout for other vehicles using the highway at the time of and immediately preceding the accident testified about in this case, and that such failure on his part was the sole proximate cause of said accident, and that said Mundy was at the time the agent of Hayes Richlands Metal Products, Inc., then your verdict should be for the plaintiff, and you shall fix his damages at such sum as the evidence may show him entitled to, not exceeding, however, the sum of $50,000.00, the amount sued for.

Given 3-11-59.

V. L. S., JR., Judge.

page 32 } INSTRUCTION NO. 3-A.

The Court instructs the jury that if you believe from a preponderance of the evidence in this case that at the time of the accident testified about, the defendant, Charles Mundy, was employed by the defendant, Hayes Richlands Metal Products, Inc.; that the truck which he was operating at the time of the accident had been left at the place of business of said Hayes Richlands Metal Products, Inc. by its owner for the purpose of having certain work done thereon, and that after the completion of said work, the defendant, Charles Mundy, of his own volition but acting within the scope of his

employment, express or implied, drove said truck from Hayes Richlands Metal Products, Incorporated's place of business to a service station, and while so driving said truck was guilty of negligence which was the sole proximate cause of the injuries to the plaintiff, then his employer, Hayes Richlands Metal Products, Inc., would be liable for such negligence on the part of the said Mundy.

Given 3-11-59.

V. L. S., JR., Judge.

page 33 } INSTRUCTION NO. 4.

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant, Charles Mundy, was driving the truck testified about in this case in an easterly direction on U. S. Highway No. 460, and when he reached a point at or near the entrance to the Texaco Service Station near the east corporate limits of the Town of Richlands, he brought said truck to a stop in his right-hand traffic lane, and while so stopped, the automobile being driven by the plaintiff was proceeding in a westerly direction and within the view of the said Mundy, then the said plaintiff, J. E. Honaker, had the right to assume that the said Mundy in so stopping did so with the intention of waiting until he, the said Honaker, had passed said driveway entrance, and that the said Mundy would not turn left and drive said truck across the west traffic lane in the face of the oncoming automobile.

Given 3-11-59.

V. L. S., JR., Judge.

page 34 } INSTRUCTION NO. 5.

The Court instructs the jury that if J. E. Honaker, through no fault of his own, was suddenly confronted with an emergency, and was compelled to act instantly in an effort to avoid the accident, he was not guilty of negligence if he made such a choice as a person of ordinary prudence placed in such a position would have made, even though Honaker did not make the wisest choice; and whether he used reasonable care under all circumstances is a question for the jury.

Given 3-11-59.

V. L. S., JR., Judge.

page 35 } INSTRUCTION NO. 6-A.

The Court instructs the jury that if, under all the evidence and the instructions of the court, you should find for the plaintiff, you may, in fixing his damages, take into consideration, so far as shown by a preponderance of the evidence, the bodily injuries he sustained, if any; the mental anguish and physical pain resulting therefrom, if any; the effect of the said injuries upon the health of the plaintiff, if any, according to their degree and probable duration as being temporary or permanent; such mental anguish, physical suffering or impairment of health or bodily functions as may, from the evidence, reasonably be expected to hereafter continue or occur as the result of the injuries received in said collision, if any; the impairment of his nervous system shown to have resulted from such injuries, if any; the loss of earning capacity sustained by the plaintiff as a result of the injuries, if any; expenditures for or cost of medical treatment for the injuries resulting from said collision, if any, including any such cost or expenditures as may, from the evidence, be reasonably expected and required in the future, if any; the value of plaintiff's automobile immediately prior to the accident should the evidence show that said automobile was completely destroyed, or that the cost of repairing the same would exceed its value immediately prior to the accident, less any amount received for the salvage thereof, and assess the plaintiff's damages at such sum as will be just, reasonable and proper compensation, not, however, in excess of the amount of $50,000.00, claimed in plaintiff's motion for judgment.

Given 3-11-59.

V. L. S., JR., Judge.

page 36 } INSTRUCTION NO. 7.

The Court instructs the jury that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under existing circumstances would not have done.

Given 3-11-59.

V. L. S., JR., Judge.

page 37 } INSTRUCTION NO. 8-A.

The Court further instructs the jury that the law looks to the proximate cause without which, not withstanding all other causes, the occurrence would not have taken place, and holds him or them liable whose negligence is the proximate cause or causes of the accident.

Given 3-11-59.

V. L. S., JR., Judge.

* * * * *

page 39 } INSTRUCTION NO. C.

The Court instructs the jury that, under the evidence in this case, J. E. Honaker was driving his automobile immediately before the accident at a speed in excess of 55 miles an hour and, by reason thereof, he (J. E. Honaker) was guilty of negligence as a matter of law.

Refused 3/11/59.

V. L. S., JR., Judge.

page 40 } INSTRUCTION NO. E.

The Court instructs the jury that, under the evidence in this case, J. E. Honaker observed and understood the signal of the defendant, Mundy, to make a left turn, and that J. E. Honaker thereafter failed to keep his vehicle under complete control and avoid the accident testified about in this case, and, by reason thereof, he (J. E. Honaker) was guilty of negligence as a matter of law.

Refused 3/11/59.

V. L. S., JR., Judge.

page 41 } INSTRUCTION NO. G.

The Court instructs the jury that if J. E. Honaker, as he approached the scene of the accident and when he reached a point 500 feet or more east of the place of accident, saw the truck driven by Mundy and its left-hand signal device indicating it was about to make a turn to the left, into the service station entrance, and such signal continued, without

change, then Honaker had no right to assume that Mundy would not make a turn to the left as he did pursuant to such signal.

Refused 3/11/59.

V. L. S., JR., Judge.

page 42 } INSTRUCTION NO. H.

The Court instructs the Jury that even though you should believe that Mundy saw, or by the exercise of reasonable care, should have seen the Honaker car before he started across the west traffic lane of the highway, yet he had a right to assume that Honaker would travel at a lawful and reasonable rate of speed; and if he reasonably believed that he could cross in safety, he was not guilty of negligence in attempting to cross.

Refused 3/11/59.

V. L. S., JR., Judge.

page 43 } INSTRUCTION NO. N.

The Court instructs the jury that a driver of a motor vehicle may drive across a lane of travel in view of a motor vehicle approaching in said lane if it is, under the circumstances existing, consistent with ordinary care to do so.

Already given.

Refused 3/11/59.

V. L. S., JR., Judge.

INSTRUCTION NO. O.

The Court instructs the jury that, although the driver of the Mundy truck was making a left turn across the highway when the collision occurred, yet he is presumed to have been exercising reasonable care in doing so, and the mere fact of a collision with an oncoming vehicle does not establish negligence of said truck driver, nor show that the action of the truck driver was the proximate cause of the collision.

Refused 3/11/59.

V. L. S., JR., Judge.

INSTRUCTION NO. P.

The Court instructs the jury that, in determining whether or not the movement across the highway could be made in safety, said Mundy had the right to presume that the car driven by Honaker, in approaching the place of collision, would be driven and operated at a reasonable speed and in a lawful manner.

Refused 3/11/59.

V. L. S., JR., Judge.

page 44 } INSTRUCTION NO. R.

The Court instructs the jury that having given the signal, plainly visible to Honaker, for a left turn across the highway at the place in question, it was the duty of said Mundy, under the law, to continue his course across the highway, in accordance with the indication of his signal.

Refused 3/11/59.

V. L. S., JR., Judge.

INSTRUCTION NO. S.

The Court instructs the jury that, notwithstanding the fact that the Plaintiff Honaker had a sick man in his car, that did not render Honaker immune to the provisions of the traffic laws nor enlarge his rights or privileges under said laws, but that the requirements of the law were exactly the same, with reference to control of his automobile, as to speed of same and as to the exercise of due care in driving as if Honaker had been the sole occupant of said automobile.

Refused 3-11-59.

V. L. S., JR., Judge.

page 45 } INSTRUCTION NO. U.

The Court instructs the jury that, if you believe from the evidence that Plaintiff Honaker, after receiving the signal of the left turn by Mundy, did not use reasonable care to bring and keep his automobile under complete control, but there-

after drove and operated same to and toward the place of accident at an excessive and dangerous rate of speed and into and against the truck driven by Mundy, then said Honaker was guilty of negligence.

Refused 3-11-59.

V. L. S., JR., Judge.

INSTRUCTION NO. V.

The Court instructs the jury that it was the duty of the Plaintiff, as he approached the scene of collision to drive his automobile at a reasonable and lawful rate of speed, to use due care to keep it under control, and to keep a reasonable lookout for cars crossing over the north traffic lane, including Defendants' truck, and after he saw or by the exercise of reasonable lookout should have seen Defendants' truck upon or approaching said crossing, to use reasonable care to stop his automobile before running into Defendants' truck, or to avoid striking it, by driving his automobile to the rear of said truck, and if he failed to do this, then he was guilty of negligence.

Refused 3-11-59.

V. L. S., JR., Judge.

page 46 } INSTRUCTION NO. W.

The Court instructs the jury that, even though you may believe from the evidence that the driver of the Mundy truck stopped at the place where he turned across the highway, and that Honaker, when he first saw it, reasonably thought that said truck would remain there until the Honaker car passed; yet this did not relieve Honaker of the duty of exercising reasonable care to discover that Mundy did not intend to remain stopped but intended to cross said highway, or by the exercise of reasonable care could have discovered said purpose, and if Honaker did discover said purpose before said collision, then it was the duty of Honaker to use reasonable care to stop his automobile or to turn aside to the left so as to avoid a collision, and if he failed to do this, then he was guilty of negligence.

Refused 3-11-59.

V. L. S., JR., Judge.

page 47 } INSTRUCTION NO. Y.

The Court instructs the Jury that unless you believe from the evidence that Mundy's taking of the truck of McGlothlin from the place of business of Hayes Richlands Metal Products, Incorporated, was an act fairly and naturally incident to the business of said Corporation, or to the duties of Charles Mundy, or that he had express or implied authority to so deliver said truck, then said Mundy was not acting within the scope of his authority as an employee of said Defendant Corporation, and you must find for the said Defendant Corporation.

Refused 3-11-59.

V. L. S., JR., Judge.

page 48 } INSTRUCTION NO. 3-D.

The Court further instructs the jury that, even though you believe that Defendant Mundy was guilty of negligence which was a proximate cause of the collision and consequent injury complained of, yet, if you shall further believe from the evidence that Honaker was also guilty of negligence which proximately caused or contributed to the collision and consequent injury resulting therefrom, then you can not find for the Plaintiff but must find for the Defendant.

Already given.

Refused 3-11-59.

V. L. S., JR., Judge.

page 49 } INSTRUCTION NO. A-1.

The Court instructs the jury that he who undertakes to hold another liable in damages on the ground of negligence must himself be free from any negligence contributing proximately to the cause of the injury of which he complains. And if the jury believe from the evidence that the plaintiff was guilty of any negligence, however slight, which contributed proximately to the cause of the accident from which his injuries resulted, they must find for the defendants.

Given 3-11-59.

V. L. S., JR., Judge.

page 50 } INSTRUCTION NO. B.

The Court instructs the jury that it was the duty of Honaker to use ordinary care for his own safety. Ordinary care is such care as a person of ordinary prudence similarly situated and having the same knowledge which you believe from the evidence Honaker had or should have had would have been expected to use under the existing circumstances.

If the jury believe from the evidence that Honaker failed to exercise ordinary care, then he was guilty of negligence, and if such negligence on his part proximately contributed to the accident, they must find for the defendants, even though they may further believe from a preponderance of the evidence that the defendant, Mundy, was also guilty of negligence.

Given 3-11-59.

V. L. S., JR., Judge.

page 51 } INSTRUCTION NO. D.

The Court instructs the jury that if you believe from the evidence in this case that the plaintiff, J. E. Honaker, was driving his automobile immediately before the accident at a speed in excess of 55 miles an hour, then this was in violation of the law and was negligence on his (J. E. Honaker's) part.

Given 3-11-59.

V. L. S., JR., Judge.

page 52 } INSTRUCTION NO. F.

The Court instructs the jury that if you believe from the evidence that the defendant, Charles Mundy, before turning left, used reasonable and ordinary care under the circumstances to see that such movement could be made in safety, and gave a signal of his intention to make such movement by an approved mechanical or electrical device continuously for a distance of at least 100 feet before turning, and that the plaintiff, Honaker, observed such signal, then it was the duty of Honaker to (1) keep his vehicle under complete control and (2) be able to avoid an accident resulting from a misunderstanding of such signal, and failure of Honaker to do

either was in violation of the law and constituted negligence on his (J. E. Honaker's) part.

Given 3-11-59.

V. L. S., JR., Judge.

page 53 } INSTRUCTION NO. I.

The Court instructs the Jury that before turning from a direct lane of travel, it is incumbent upon the driver to use reasonable and ordinary care under the circumstances to see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, to give a signal as required by Statute. In this connection, if you believe from the evidence that the Defendant, Mundy, before turning left from his direct lane of travel, used reasonable and ordinary care under the circumstances to see that such movement could be made in safety, and gave a signal of his intention to make such movement by an approved mechanical or electrical device continuously for a distance of at least 100 feet before turning, then the said Mundy was not guilty of any negligence, and you shall find for the Defendants.

Given 3-11-59.

V. L. S., JR., Judge.

page 54 } INSTRUCTION NO. J.

The Court instructs the jury that this is an action whereby the Plaintiff Honaker seeks to recover damages from Defendants on account of alleged negligent injury to Plaintiff by Defendants. And the Court tells the jury that the charge of negligence is not any evidence of Defendants' negligence, nor is proof of the fact that Plaintiff was injured or damaged as the result of a collision with a truck operated by Defendants proof of negligence. But, before you can find a verdict for the Plaintiff in this case, you must believe from a preponderance of the evidence that Plaintiff was injured, and that said injury was the sole proximate result of Defendants' negligence. The graveman of this action is the alleged negligence of Defendants, and until this is shown by a preponderance of the evidence, there can be no recovery against Defendants.

Given 3-11-59.

V. L. S., JR., Judge.

INSTRUCTION NO. K.

The Court instructs the jury that, if you believe from the evidence that Honaker was guilty of negligence which was the sole proximate cause of the collision here in question, then the Plaintiff can not recover, and you must find for the Defendants.

Given 3-11-59.

V. L. S., JR., Judge.

INSTRUCTION NO. L.

The Court instructs the jury that the burden is upon the Plaintiff to prove negligence and liability by a preponderance of the evidence. It is not sufficient that the evidence is consistent equally with the existence or non-existence of negligence on the part of Defendants. Before the Plaintiff can recover, there must be affirmative and preponderating proof that Defendants' negligence solely and proximately cause the alleged injury, otherwise you must find for Defendants.

Given 3-11-59.

V. L. S., JR., Judge.

page 55 } INSTRUCTION NO. M.

The Court further instructs the jury that, if you believe from the evidence in this case that the accident which resulted in the alleged injury of Plaintiff was occasioned by the concurring negligence of both Plaintiff and Defendants, which has contributed as a proximate cause of the accident complained of, there can be no recovery by the Plaintiff, as Courts will not undertake to balance the negligence of the respective parties, where both have been at fault to determine which one was most at fault.

Given 3-11-59.

V. L. S., JR., Judge.

INSTRUCTION NO. Q.

The Court instructs the jury that, upon the question of whether Defendants used reasonable care to see that his

left turn across the highway could be made in safety is to be judged and determined by the standard of whether or not a reasonably prudent person, under the same or similar circumstances, would have concluded that such left turn could be made in safety.

Given 3-11-59.

V. L. S., JR., Judge.

INSTRUCTION NO. T.

The Court instructs the jury that, irrespective of the maximum speed limits at a given place, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property is guilty of negligence.

Given 3-11-59.

V. L. S., JR., Judge.

page 56 } INSTRUCTION NO. X.

The Court instructs the jury that, even though you may believe that Mundy was an employee of the Defendant, Hayes Richlands Metal Products, Incorporated, in the sense that he had a job with said corporation and worked regularly for it, yet unless you shall further believe from a preponderance of the evidence that Charles Mundy at the time of the collision in question was engaged in the work of the Hayes Richlands Metal Products, Incorporated, and within the scope of his employment and acting within the scope of his express or implied authority by it, then said corporation was not liable for any alleged negligent acts of Charles Mundy, if any have been shown by the evidence, and you can not find against Defendant, Hayes Richlands Metal Products, Incorporated.

Given 3-11-59.

V. L. S., JR., Judge.

page 57 } INSTRUCTION NO. Z.

The Court instructs the Jury that, while it is true that an act done by one shown to have been a servant at the time is presumed to have been done in the scope of his employment,

yet this is merely a presumption of fact and exists only in the absence of evidence showing the actual occurrence; and, if you believe from the evidence in this case that Charles Mundy was employed by Hayes Richlands Metal Products, Incorporated, as a mechanic to repair and condition motor vehicles at its place of business, and that his employment did not include nor embrace the delivery of such motor vehicles from said Defendant's place of business to such place as the owner might direct, and that Mundy did not have express or implied authority to deliver said truck, but that he was, at the time of the accident, delivering or undertaking to deliver the McGlothlin truck to the Texaco Filling Station solely on account of the direction and request of its owner, McGlothlin, then he was not the servant of said Hayes Richlands Metal Products, Incorporated, and was not acting in the scope of his employment by it, and it was not liable for any wrongful or negligent acts of his, if any.

Given 3-11-59.

V. L. S., JR., Judge.

page 58 } INSTRUCTION NO. 2-1.

The Court instructs the jury that an agent or servant has express authority when he is expressly told to do the thing which he was doing at the time in question.

Given 3-11-59.

V. L. S., JR., Judge.

INSTRUCTION NO. Z-2.

The Court instructs the jury that implied authority involves an inference arising from a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection in the conduct or transaction of the alleged agent or servant, which under the circumstances implies consent of the employer to the doing of the act in which the alleged agent or servant was engaged at the time.

Given 3-11-59.

V. L. S., JR., Judge.

page 59 } INSTRUCTION NO. Z-3.

The Court instructs the jury that even though you may believe from a preponderance of the evidence that the facts detailed in INSTRUCTION NO. 4 existed, and that by reason thereof Honaker had the right to assume that Mundy stopped with the intention of waiting until he (Honaker) had passed the drive way entrance and that Mundy would not turn left and drive said truck across the west traffic lane in face of the oncoming traffic, you cannot find for the plaintiff if he (Honaker) was guilty of negligence or unlawful operation of his automobile which proximately contributed to the cause of the accident in question.

Given 3-11-59.

V. L. S., JR., Judge.

page 60 }

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, April 2, 1959.

Teste:

ELIZABETH BELEW, Deputy Clerk.

MOTION TO SET ASIDE VERDICT.

The defendant, Hayes Richlands Metal Products, Inc., moves the Court to set aside the verdict of the jury for the plaintiff rendered in this case on the 12th day of March, 1959, at which time the jury returned a verdict in favor of the plaintiff for $6,000.00, and to enter judgment for the said defendant, notwithstanding the verdict, upon the ground that the verdict is contrary to the evidence and is without evidence to support it, and is contrary to the law as applicable to the undisputed and uncontradicted facts in the case.

In the event the Court should overrule the motion to enter judgment for the defendant, notwithstanding the verdict, the said defendant moves the Court to grant it a new trial because the verdict is contrary to the law and the evidence and for the following additional reasons and upon the following additional grounds:

(1) Because, even if it should be admitted, which is denied, that the defendant was guilty of negligence which was a proximate cause of the alleged injury to plaintiff, yet the uncontradicted evidence shows that the plaintiff himself was guilty of negligence which was a proximate cause of and which proximately contributed to plaintiff's alleged injury.

(2) While the evidence in the case fails to show that the defendant, Charles Mundy, was guilty of any negli-
page 61 } gence, which proximately caused or contributed to plaintiff's alleged injury, yet even if it had so shown, this defendant, Hayes Richlands Metal Products, Inc., is not liable in damages for the further reason that said Charles Mundy was not the agent, servant or employee of said corporate defendant, acting in the course of his employment at the time of said alleged injury.

(3) Since there was no liability on the part of defendant, Hayes Richlands Metal Products, Inc., under the law and the evidence, plaintiff was not entitled to any instructions in the case predicated upon such alleged liability, and the giving of any instructions for plaintiff in this case was error, and it was, therefore, prejudicial error to give instructions for the plaintiff, Instructions Nos. 1 to 8, inclusive, and it was error to give each and all of said instructions.

(4) The Court erred in refusing to give certain instructions offered by the defendants upon objection by plaintiff, and particularly erred in failing and refusing to give Instructions C, E, G, H, N, O, P, R, S, U, V, W and Y offered by the defendants.

(5) The Court erred in giving any instructions for plaintiff, as aforesaid, and particularly erred in giving Instructions No. 1, 2 and 3 to the effect that, if Mundy's conduct was the sole proximate cause of the collision and accident, then they should find for the plaintiff, because, as a matter of law, Mundy's conduct was not the sole proximate cause of the accident.

(6) The Court erred in giving plaintiff's Instruction No. 3, for the reason that it invited and permitted the jury to find that Charles Mundy, at the time of the accident, was the agent, servant and employee of defendant, Hayes Richlands Metal Products, Inc., and, in the course of his employment when, under the evidence and all of the evidence, he was not at said time such agent, servant and employee of said corporation.

page 62 } (7) The Court particularly erred in giving plaintiff's Instruction No. 4 because it is not a correct statement of law, it is contrary to the express mandate of the statute, and is an inapt, inappropriate and misleading state-

ment which was highly prejudicial to defendant, and completely nullified the defense of contributory negligence.

(8) The Court also particularly erred in giving plaintiff's Instruction No. 5, because, as a matter of law, any emergency with which the plaintiff was confronted was a result of his own wrongful acts and misconduct.

(9) The Court erred in refusing to strike the plaintiff's evidence.

Respectfully submitted.

HAYES RICHLANDS METAL PRODUCTS, INC.,
By T. G. SHUFFLEBARGER
Of Counsel.

T. G. SHUFFLEBARGER
Richlands, Virginia.

A. G. LIVELY
Lebanon, Virginia.

Counsel for defendant,
Hayes Richlands Metal Products, Inc.,

I hereby certify that I have this day mailed a copy of the foregoing Motion to set aside Verdict to J. P. Proffitt, Jr., Esquire, Tazewell, Virginia, and Carl C. Gillespie, Esquire, Tazewell, Virginia, counsel of record for the plaintiff, and to Charles Mundy, the other defendant, this 2nd day of April, 1959.

T. G. SHUFFLEBARGER
Of Counsel for defendant Hayes Richlands Metal Products, Inc.

page 63 }

• • • • •

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, April 2, 1959.

Teste:

ELIZABETH BELEW, Deputy Clerk.

MOTION OF CHARLES MUNDY TO SET ASIDE THE VERDICT.

The Defendant, Charles Mundy, moves the Court to set aside the verdict of the jury for the Plaintiff rendered in this case on the 12th day of March, 1959, at which time the jury returned a verdict in favor of the Plaintiff for $6,000.00, and to enter judgment for this Defendant, notwithstanding the verdict, upon the grounds that the verdict is contrary to the evidence and is without evidence to support it and is contrary to the law as applicable to the undisputed and uncontradicted facts in the case.

In the event the court should overrule the motion to enter judgment for the Defendant, notwithstanding the verdict, this Defendant moves the Court to grant him a new trial because the verdict is contrary to the law and the evidence and for the following additional reasons and upon the following additional grounds:

This Defendant, in his own right, here adopts Paragraphs numbered 1, 4 (except as to Instruction No. Y), 5, 7, 8 and 9, as set forth in the motion of Hayes Richlands Metal Products, Inc., to set aside the verdict, this day filed as fully as if said grounds and said paragraphs were copied into this motion verbatim.

CHARLES MUNDY.

page 64 } I hereby certify that I have this day mailed a copy of the foregoing Motion to Mr. J. P. Proffit and Mr. Carl C. Gillespie, both of Tazewell, Virginia, and to Judge A. G. Lively and Mr. T. G. Shufflebarger, of Lebanon, Virginia, and Richlands, Virginia, respectively.

Dated this the 2nd day of April, 1959.

CHARLES MUNDY.

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* * * * *

ORDER.

On the 10th day of March, 1959, came the plaintiff, in person and by his attorneys, and came also the defendant, Hayes

Richlands Metal Products, Incorporated, by its attorneys, and the defendant, Charles Mundy, in person, and thereupon, came a jury of seven persons, who were sworn to well and truly try and a true verdict render between the plaintiff and the defendants upon the issues joined by them in this action, to-wit: V. P. Thomas, Carl E. Creasy, J. W. Perkins, James E. Hughes, Herbert Ward, G. G. Roach, and W. J. Hankins.

The hour of five o'clock p. m. having arrived and the parties having failed to complete the trial of said case on said 10th day of March, 1959, the court recessed the trial of said case until the following morning, March 11, 1959, at nine o'clock a. m. when said trial was again resumed. The plaintiff having rested his case on said 11th day of March, 1959, the defendants thereupon moved the court to strike out the evidence of the plaintiff on the following grounds:

(a) Evidence of the plaintiff fails to show that the defendant was guilty of any negligence which was the proximate cause of the accident complained of.

(b) The evidence showed that the plaintiff was guilty of contributory negligence as a matter of law which barred his recovery.

Thereupon, the defendant, Hayes Richlands Metal Products, Incorporated, further moved the court to strike out the evidence of the plaintiff as to it for the reason that the evidence was insufficient to establish that the defendant, Charles Mundy, was its agent or servant at the time of the accident.

Upon consideration whereof, the court overruled
page 66 } said motions of the defendants, to which rulings of the court the defendants, by counsel, excepted.

Thereupon, the trial of the case proceeded until the hour of five o'clock p. m., and the same not being completed the court recessed until the following day, March 12, 1959, at nine o'clock a. m., at which time said trial resumed. At the conclusion of the introduction of all of the evidence the defendants, by counsel, renewed their motion to strike out the evidence of the plaintiff upon the same grounds as those offered at the conclusion of the introduction of the plaintiff's evidence, which motion the court again overruled, to which action of the court the defendants, by counsel, excepted.

Thereupon, the jury having heard all of the evidence introduced in behalf of the respective parties, the instructions of the court, and the arguments of counsel, retired to their room to consider of their verdict, and after a time returned to court and rendered the following verdict, to-wit:

"We the jury find for the plaintiff J. E. Honaker in the amount of $6,000.00 damages. J. W. Perkins, Foreman."

Thereupon, the jury was discharged from further consideration of the case.

The defendants thereupon moved the court to set aside the verdict of the jury and requested the court to allow them a reasonable time within which to prepare and file written grounds for said motion, and the court, thereupon, granted unto the defendants 21 days from said 12th day of March, 1959, in which to file their grounds in writing in support of their motion to set aside the verdict of the jury in this case, and said motion to set aside the verdict and the grounds in support thereof were duly filed in the Clerk's Office of this court on April 2, 1959.

On the 10th day of April, 1959, came again the parties, by counsel, and the court proceded to hear the arguments of counsel upon the motion of the defendants to set aside the verdict in this cause, and upon consideration whereof, and the court being of opinion that said motion should be overruled,

page 67 } it is adjudged and ordered that the motion of the defendants to set aside the verdict in this case be, and the same is hereby overruled, to which action of the court the defendants, by counsel, excepted. It is, therefore, considered, adjudged and ordered that the plaintiff, J. E. Honaker, recover of and from the defendants, Hayes Richlands Metal Products, Incorporated, and Charles Mundy, the sum of Six Thousand Dollars ($6,000.00), in accordance with the verdict of the jury, together with interest thereon from the 12th day of March, 1959, until paid, and the costs of this action.

The defendants, by counsel, having announced to the court their intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to said judgment, moved the court to suspend execution of said judgment, which motion was granted by the court, and it is further adjudged and ordered that execution on said judgment be suspended for a period of ninety (90) days from this the 10th day of April, 1959, and thereafter until the defendants' petition for a writ of error is acted upon by the Supreme Court of Appeals, if such petition is actually filed within said time, provided said defendants, or someone for them, shall execute bond in the Clerk's Office of this court, with surety to be approved by said Clerk in the penalty of $500.00, within fifteen (15) days from this 10th day of April, 1959, conditioned upon the

payment of all damages as may accrue to any person by reason of such suspension.

Requested:

J. P. PROFFITT, JR.
Of Counsel for the Plaintiff.

Examined:

T. G. SHUFFLEBARGER
Of Counsel for Defendants.

Enter 13th day of April, 1959.

V. L. S., JR., Judge.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To H. Elmer Kiser, Clerk of said Court:

Pursuant to Rule 5:1, §4 of the Rules of Supreme Court of Appeals of Virginia, counsel for HAYES RICHLANDS METAL PRODUCTS, INCORPORATED, and CHARLES MUNDY, the defendants in the above styled case, in said Court, hereby give notice of appeal from the final judgment in said case, entered on the 13th day of April, 1959, and that the said defendants will apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* from said judgment; and set forth the following assignments of error that will be relied on:

(1) The Court erred in overruling the corporate defendant's motion to strike the evidence, in granting any instructions for plaintiff against the corporate defendant, and in overruling its motion to set aside the verdict, thereby holding that the evidence was sufficient for the jury to find that Charles Mundy was the agent of the corporate defendant and acting within the scope of his employment at the time of the accident in question, when, in fact, as revealed by the record, there was no such evidence upon which such a finding could be made, but, on the contrary, all the evidence affirmatively showed that he was not its agent and was not acting within the scope of his employment.

(2) The Court erred in overruling defendants' motion to strike the evidence, in granting any instructions for plaintiff, and in overruling defendants' motion to set aside the verdict, and thereby holding that the evidence was sufficient page 70 } for the jury to find that the defendant, Charles Mundy, was guilty of negligence which was the sole proximate cause of the accident in question, when, in fact, as revealed by the record, there was no such evidence upon which such a finding could be made, but, on the contrary, all the evidence affirmatively showed that he was complying with the law and was guilty of no negligence, at the time of the accident in question.

(3) The Court erred in overruling defendants' motion to strike the evidence, in granting any instructions for plaintiff, and in overruling defendants' motion to set aside the verdict, and thereby, in effect, holding that, under the evidence, the plaintiff, J. E. Honaker, was not guilty of any negligence which caused, or which contributed proximately to the cause of, the accident in question, when, in fact, as revealed by the record, all the evidence affirmatively showed that J. E. Honaker, and he alone, was guilty of negligence which was the sole proximate cause of the accident in question.

(4) The Court erred in overruling defendants' motion to strike the evidence, in granting any instructions for plaintiff, and in overruling defendants' motion to set aside the verdict, because, under the evidence, the plaintiff was guilty of contributory negligence, as a matter of law, and was, therefore, not entitled to recover anything.

(5) The Court erred in giving any instructions for the plaintiff because, under the evidence, the plaintiff had no right of recovery, and because any and all instructions given for the plaintiff were without evidence to support them.

(6) The Court erred in giving plaintiff's Instructions Nos. 1-A, 2, 3-A, 6-A, 7 and 8-A over defendants' objections, particularly for reasons stated in the record.

page 71 } (7) The Court erred in giving plaintiff's Instruction No. 4 over defendants' objections because said instruction is not a correct statement of the law, is not applicable to the facts of the case, and is misleading, and for all the other reasons stated in the record.

(8) The Court erred in giving plaintiff's Instruction No. 5 over defendants' objection because said instruction is not applicable to the facts of the case, in that plaintiff was, as a matter of law, not without fault in bringing about the alleged emergency, and for the other reasons stated in the record.

(9) The Court erred in refusing to give Instructions Nos. C, E, G, H, N, O, P, R, S, U, V, W, Y and 3-D, offered by the defendants, for reasons stated in the record.

(10) The Court erred in overruling defendants' motion to set aside the verdict because the verdict was contrary to law and without evidence to support it.

(11) The Court erred in entering judgment for the plaintiff on the verdict because it was contrary to the evidence and without authority in law.

THOMAS G. SHUFFLEBARGER
A. G. LIVELY
Counsel for defendants.

THOMAS G. SHUFFLEBARGER,
Richlands, Virginia.

A. G. Lively,
Lebanon, Virginia.

Counsel for defendants.

page 72 } I hereby certify that I have this day filed the original of this Notice of Appeal and Assignments of Error with the Clerk of the Circuit Court of Tazewell County, Virginia, and mailed (1) a copy thereof to J. P. Proffitt, Jr., Esquire, Tazewell, Virginia, and (2) a copy thereof to Carl C. Gillespie, Esquire, Tazewell, Virginia, counsel of record for the plaintiff, this 8th day of June, 1959.

THOMAS G. SHUFFLEBARGER
Of counsel for defendants.

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, June 8, 1959.

Teste:

ELIZABETH BELEW, Deputy Clerk.

* * * * *

Tried before Hon. V. L. Sexton, Jr., Judge and a jury at Tazewell, Virginia on Tuesday, Wednesday and Thursday, March 10th, 11th and 12th, 1959.

Appearances: For the Plaintiff: J. P. Proffitt, Jr., Esq. and Messrs. Gillespie and Gillespie, Carl C. Gillespie, Esq.

For the Defendants: T. G. Shufflebarger, Esq. and A. G. Lively, Esq.

* * * * *

page 4 } CARLYLE MAHAFFEY,

a witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Would you please state your name?

A. Carlyle Mahaffey.

Q. 2. Where do you live?

A. Cedar Bluff, Virginia.

Q. 3. What is your occupation or profession?

A. I am an engineer for the Norman Mining Company at Richlands.

Q. 4. How long have you engaged in the practice of your profession?

A. Fourteen years.

Q. 5. During that time for whom have you worked?

A. I worked for the American Coal Company in West Virginia for about, I say, ten or eleven years, and I was with Pocahontas Fuel Company at Pocahontas, Virginia a little over a year and I been in my present position a little over two years now.

Q. 6. Does mining engineering require any knowledge of land surveying?

A. Yes. You do the same thing on the ground that you do under the surface. It is done a little differently is the only difference.

Q. 7. What preparation have you had, if any, to prepare yourself as a civil engineer and land surveyor?

A. I had a high school education and two years at college, and I been employed as a surveyor and engineer for page 5 } *for* fourteen years.

Q. 8. And during that time have you worked under a graduate civil engineer?

A. Yes, sir, I have.

Q. 9. Mr. Mahaffey, some time subsequent to September 2nd of 1956 did you make a survey of U. S. Highway No. 460 in the vicinity of the new Richlands High School?

A. Yes, sir.

Q. 10. What portion of that highway did you survey on that occasion?

A. I surveyed from right near the crest of the mountain to the school house at a sign post in the direction toward Richlands, locating all the turn-outs on the right side of the road for approximately sixteen hundred feet.

Carlyle Mahaffey.

Q. 11. Is that the right side of the road as you go toward Richlands?

A. Yes, sir.

Q. 12. Would that be the North or South side of the highway?

A. That would be the North side of the highway.

Q. 13. After making your survey did you make a map of the highway, showing those driveways, entrances or turn-outs as described there?

A. Yes, sir, I did.

Q. 14. I hand you what purports to be a print or map of U. S. Route No. 460, and will ask you if that is the map you made of the highway between the points which you have stated you surveyed as a result of that survey?

A. Yes, sir, it is.

page 6 } Q. 15. Would you state to the jury just what scale that map has been drawn to?

A. I made the map to two scales. I made the length of the highway scale of one inch indicates fifty feet. I made the width the scale one inch equals ten feet, which gives a better picture of the highway than if it was made on one scale.

Q. 16. Will you point out to the jury, on the map, which direction is East?

By the Court: Are you going to introduce that as an exhibit?

By Mr. Gillespie: Yes, sir. We would like to offer this map in evidence.

By the Court: Give counsel a copy of it.

By Mr. Gillespie: We would like to offer this map as Plaintiff's Exhibit No. 1.

Thereupon the map so offered in evidence was filed, marked for identification as "Plaintiff's Exhibit No. 1" and the same was placed in the Court File.

Q. 17. Now, Mr. Mahaffey, would you point out to the jury, on this map, the four directions? That is, East, West, North and South.

A. I have them marked—West to Richlands, on the other end.

Q. 18. If you don't mind, point it out to the jury?

A. This is East and that West; this is North and South. This is the North side that has all the turn-outs there entering into Route No. 460.

Carlyle Mahaffey.

Q. 19. Would you point out on Plaintiff's Exhibit page 7 } No. 1 the turn-out, as you refer to it, which leads to the C & S Texaco Service Station?

A. This is the East entrance and this the West. This is the Texaco Service Station sitting right there, as marked.

Q. 20. And there are two turn-outs leading to that Service Station?

A. Yes, sir.

Q. 21. Can you tell the jury the distance from the West entrance to the Texico Service Station that there is visibility to the East in feet or yards?

A. From the East entrance to the West?

Q. 22. From the East entrance to the West, what is the distance of visibility?

A. I would say it is approximately one hundred fifty feet. You are speaking of this entrance to this one over here?

Q. 23. How far from the West entrance—how far can one see to the East? How far can a person have an unobstructed view at the West entrance?

A. That is approximately five hundred fifty feet. You are able to see from here to the end of the map, or the beginning of where I started, which is a distance of approximately five hundred fifty feet.

Q. 24. And what is the distance of visibility from, say the top of the hill where you started surveying East, back West?

A. I would say the visibility is the length of this map, sixteen hundred feet.

Q. 25. This is comparatively a straight stretch of road?

A. Yes, except for the gradual turn you have page 8 } here, and this goes out of sight.

Q. 26. What is the width of the highway there at that point?

A. Thirty feet.

By Judge Lively: That is the actual hard-top. The width of that is thirty feet.

Q. 27. What, if anything, is on the South side,—any sidewalk or shoulder or anything of that nature?

A. There is no sidewalks. There is three or four establishments on that side. I don't have them located.

Q. 28. What about the North side?

A. On the North side you have the sidewalk, and the turn-out as indicated, and the entrances to the different places

Carlyle Mahaffey.

are marked. The Piggly-Wiggly Store, parking area for the Piggly-Wiggly store.

Q. 29. What is the width of the sidewalk on the North side?

A. Five feet.

Q. 30. What is between the sidewalk and the paved portion of the highway, if anything?

A. The paved highway comes right to the edge of the sidewalk. The outer edge on the South side to the sidewalk, the distance I have there is thirty feet.

Q. 31. Is the sidewalk on the same or a different level from the highway?

A. It is above the highway approximately four or five inches, maybe six.

Q. 32. That would be similar to a curb and gutter there?

A. Yes, sir.

Q. 33. Now, in the area to the North of the side-
page 9 } walk there just west of the C & S Texaco Service Station, would you describe the surface of the ground there?

A. Just West of the Texaco Service Station you have a parking area for the Piggly-Wiggly Store, which now is quite an area covered by black asphalt.

Q. 34. At the time you made the survey was it paved, at that time, or did it just have gravel on it?

A. I believe it was graveled at that time, I don't recall exactly. I know it is paved now. There was a parking area there when I did make the survey.

Q. 35. Could you tell the jury what those figures which you have on the bottom of your map are, to the South of the highway—what they represent?

A. That is the length of the highway. It is marked off at one hundred foot intervals, which gives you a map easier to read, and judge the distance between those, and it will be fairly accurate to judge two hundred fifty or three hundred feet.

Q. 36. Where did you start measuring from?

A. On the top of the hill where we have a no parking sign. That sign is three hundred feet East of the West entrance to the Richlands high school.

Q. 37. Did you have a transit up at that point, and could you see to the West down to these cut-offs or driveways?

A. Yes, sir. This is not surveyed with an instrument. This is just a sketch of the road as it is.

Q. 38. Did you actually measure the distance?

Carlyle Mahaffey.

A. The distance is measured with a chain right down through the highway.

page 10 } Q. 39. Then, those measurements are accurate?

A. Yes, sir, they are measured just the way the highway leads.

Q. 40. You started measuring from this point which you have marked "0x00"?

A. Yes, sir.

Q. 41. And the next point which you have would be one hundred feet and the next two hundred, and on down the highway?

A. That is the highway for sixteen hundred feet beginning at this sign near the Richlands high school.

CROSS EXAMINATION.

By Mr. Shufflebarger:

Q. 1. Mr. Mahaffey, referring to the map which you have introduced as Plaintiff's Exhibit No. 1 you have testified that the East end of the map, where you commenced your measurement at a no parking sign was at or near the top of the hill, is that correct?

A. Yes, sir.

Q. 2. What is the condition of the road as to slope or curvature beyond that point Eastwardly, Mr. Mahaffey?

A. I would say that that, as well as I remember, is about where this begins to drop down—break down. I would say that is about the crest, it may not be, as well as I remember.

Q. 3. Is it a gradual drop?

A. It is a gradual drop at that point.

Q. 4. It is a gradual drop at that point?

A. Yes, sir.

Q. 5. As the road continues on beyond that

page 11 } point, does it continue down grade for a considerable distance?

A. Yes, it continues dropping from there until you get to Cedar Bluff.

Q. 6. And that is approximately how far away?

A. I would say that is a half mile, I guess.

Q. 7. Now, does this curve, which would appear to be a very gradual curve to the right, going East, continue in that general type of curve?

A. Yes, sir, it does, for at least three or four hundred more feet, maybe further.

Q. 8. You spoke of the pavement being thirty feet wide.

Carlyle Mahaffey.

A. Yes, sir.

Q. 9. And the sidewalk being five feet wide. I believe there is a concrete gutter between the pavement and the sidwalk, is there not?

A. Yes, sir. I would say the asphalt does not run right up against it. It joins and makes a smooth surface. I consider it a part of the road.

Q. 10. The concrete gutter between the edge of the sidewalk and the hard surface is about how wide?

A. I would not know. Four or five inches in spots and maybe further in other spots.

Q. 11. It is not uniform? It is built of concrete?

A. Yes, sir.

Q. 12. Is it not approximately twelve inches wide?

A. I could not tell you for sure, I don't know. I never paid that much attention to it,—considering from the sidewalk over to the other end of the asphalt of the

page 12 } road.

Q. 13. Now, proceeding Westwardly from the East end of the map, the first entrance is marked "West Entrance RHS."

A. Richlands High School.

Q. 14. Is that where the school known as the Richlands High School is located?

A. Yes, sir. The school is located back in this area. This is the entrance to it.

Q. 15. Then, proceeding Westwardly is the Texaco Service Station?

A. Yes, sir.

Q. 16. The parking area Piggly-Wiggly Store. That means the parking area for the Piggly-Wiggly store. That is now the shopping center?

A. Yes, sir.

Q. 18. Then next is the Piggly-Wiggly Store?

A. Yes, sir.

Q. 18. The next is W. E. Raines Supply Company?

A. Yes, sir.

Q. 19. Could you tell the jury what is on the South side of the highway beginning down here opposite W. E. Raines Store and proceeding Eastwardly. Is there a restaurant in that vicinity on the South side of the highway?

A. Yes, there is a restaurant there. I would say it is more opposite the Piggly-Wiggly than Raines.

Q. 20. There is a restaurant there?

A. Yes, sir.

Carlyle Mahaffey.

Q. 21. What is next to the restaurant?

A. A service station.

page 13 } Q. 22. That is an Esso Service Station?

A. Yes, sir.

Q. 23. Are there some other small buildings just East of the Joe Lowe Service Station?

A. There may be. The next thing that comes to my mind is Wimply Jones' restaurant. There is a little parking area that has been put in recently between the Wimpy Jones' restaurant and the Esso Station—that is just recently.

Q. 24. There is a large parking area in front of the Wimpy Jones' restaurant?

A. Yes, sir.

Q. 25. And immediately East of Wimpy Jones' restaurant what is there?

A. I believe there is an old service station or garage or something there. I don't know what name. There is a building there.

Q. 26. What was known as the Highway Motor Company?

A. May have been.

Q. 27. Is there not a dwelling house between that garage building and Wimpy Jones?

A. I don't know whether it is between; there is a dwelling between it or just before it.

Q. 28. There is a brick dwelling East of the garage building?

A. Yes, sir.

Q. 29. Between Joe Lowe's Service Station and Wimpy Jones' restaurant. State whether or not there in a street turning off the highway Southwardly down the hill?

A. I didn't notice it. When I was making the

page 14 } map I was not concerned with that side of the road.

Q. 30. Don't you know, as a matter of fact, there is a street with eight or ten houses on it between Wimpy Jones and Joe Lowe's Service Station?

A. No, I don't. If there is I was not aware of it.

Q. 31. When did you make this map?

A. September, 1957.

Q. 32. How long have you lived in Richlands?

A. I lived in Richlands about a year and I been in Cedar Bluff about a year.

Q. 33. For what purpose did you make this map, Mr. Mahaffey?

A. I was contacted by John Gillespie and Carl Gillespie

to make a survey of the road from the points indicated on the map, and showing the out-lets on the right of the road. The instructions I had from them they was not concerned about the South side of the highway. That is the reason there is no property shown on the South side.

The witness stands aside.

WILLARD NICHOLSON,
another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:
Q. 1. Your name is Willard Nicholson?
A. Yes, sir.
Q. 2. How old are you, Willard?
A. Twenty-eight.
page 15 } Q. 3. Where do you live?
A. Amonate.
Q. 4. What is your employment? Who do you work for?
A. Pocahontas Fuel Company.
Q. 5. How long have you worked for that company?
A. Since 1950 this last time.
Q. 6. What is your father's name?
A. Robert A. Nicholson.
Q. 7. What is or has been his occupation?

By Judge Lively: Objection. If the Court please, it is immaterial.
By the Court: I don't see the materiality of it.

Q. 8. Give a little back ground. Mr. Nicholson, were you in an automobile on September 2, 1956, on the occasion when your father had a seizure of thrombosis or heart attack?
A. Yes, sir.
Q. 9. What was suspected of being a heart attack?
A. Yes, sir.
Q. 10. Where were you at that time?
A. In the restaurant there at Amonate.
Q. 11. What was the first that you knew about your father's illness?
A. Well, I was standing in the restaurant there, and Mr. Honaker, Mr. McNash and one other gentleman standing in

the restaurant there talking and my father came in the back door.

By Judge Lively: If the Court please, I don't see the materiality of that at all. His father became ill.
page 16 } By the Court: I expect this witness is going to state what he did. The objection is overruled.

To which ruling of the Court the defendants, by counsel, at the time excepted.

By Judge Lively: That is at Amonate he is talking about.

By the Court: Yes, sir.

A. My father came in the restaurant there, came in the back way and walked out toward where we were, and he looked rather pale; he looked sick, and he walked up to us.

Q. 12. Don't tell what he said. Could you tell he was sick?

A. Yes, sir.

Q. 13. Did you get the Doctor for him?

A. We took him to the Doctor.

Q. 14. Who was the Doctor?

A. Doctor Flenor.

Q. 15. Did the Doctor do anything for your father or make any recommendation what should be done, if any?

A. Yes, sir. He gave him a shot, I don't know what it was, and told us to get him to the hospital as quickly as we could.

Q. 16. Was any effort made to get your father to the hospital?

A. Yes, sir.

Q. 17. What was that?

A. We had him in Mr. Honaker's car and we laid him in the back seat as soon as the Doctor told us and
page 17 } gave him that shot we started to the hospital?

Q. 18. Who was in the Honaker car with your father?

A. Myself, Mr. Honaker and my father.

Q. 19. You say your father was in the back seat?

A. Yes, sir.

Q. 20. Where were you riding?

A. In the front seat.

Q. 21. Who was driving Mr. Honaker's car?

A. Mr. Honaker.

Q. 22. How did you proceed from Amonate to the hospital? What hospital were you headed for?

Willard Nicholson.

A. We were headed for the Clinch Valley Clinic in Richlands.

Q. 23. What route did you take?

A. I don't know—I don't know the number of the route—we go through Bandy. I don't know the name off hand.

Q. 24. You came through Bandy?

A. Yes, sir.

Q. 25. Where did you go from Bandy?

A. To Cedar Bluff and from there toward Richlands.

Q. 26. Do you know about what time it was, approximately, that you all left Amonate to take your father to the hospital?

A. It must have been somewhere around noon—twelve o'clock.

Q. 27. And what day of the week was it on?

A. Sunday.

Q. 28. What kind of a day was it?

A. Seems like, so far as I can remember, a pretty
page 18 } day,—a clear day.

Q. 29. Now, did your father remain conscious all the time or not?

A. No, sir. Must have been the shot that the Doctor gave him—he finally, between Cedar Bluff and Richlands, he finally passed out from the shot I guess it was.

Q. 30. What were you doing as you rode along there with Mr. Honaker, taking your father to the hospital?

A. I was looking after my father all the time, because he complained of *aching* in his arms and *aching* all over, and he wanted me to rub his arms. They were hurting he said.

Q. 31. Were you still in the front seat of the car when you got to Cedar Bluff?

A. Yes, sir. We had him lying in the back seat and I was turned around, leaning over the back of the front seat, rubbing his arms and looking after him.

Q. 32. Do you recall anything about the lights on the car that you were taking your father to the hospital in? Were the lights on or off?

A. He had the lights on, yes, sir.

Q. 33. What kind of a car was it?

A. Pontiac.

Q. 34. Was this the car that Mr. Honaker used in his official duties as a deputy sheriff and a conservator of the peace?

A. Yes, sir.

Willard Nicholson.

By Judge Lively: That question is objected to because it is immaterial.

Which objection the Court overruled, to which page 19 } ruling of the Court the defendants, by counsel, at the time excepted.

Q. 35. Do you know whether or not this car was equipped with a siren?
A. Yes, sir.
Q. 36. How do you know that?
A. He was using it.
Q. 37. Using it when?
A. He was using it every time he came upon a scene that he should have, that necessitated it.
Q. 38. On the occasion he was taking your father to the hospital?
A. Yes, sir.
Q. 39. Now, do you recall whether or not the siren was sounding as he approached the corporate limits of Richlands?
A. Yes, sir.
Q. 40. Near the high school?
A. Yes, sir, it was.
Q. 41. Tell the jury your best estimate of Mr. Honaker's speed as he approached the crest of the hill there as he entered Richlands as he left Cedar Bluff?

By Judge lively: You mean as you came up the hill?
By Mr. Gillespie: That is right. As he approached the crest of the hill is the question.

A. He was picking up speed. He just had passed several cars and he was picking up a little speed as we went along. I would have to estimate, roughly, what it would be. I don't have any idea. I didn't look. It was between page 20 } fifty-five and sixty I would say, roughly.
Q. 42. Was that as he approached the top of the hill?
A. Maybe not that much as we approached the top,—as we kind of leveled off.
Q. 43. As you started down the other way?
A. Yes, sir.
Q. 44. Now, what about the siren? Was it still sounding?
A. Yes, sir, it was.
Q. 45. Were you looking to the West or ahead of you as

you approached the top of the hill and started toward Richlands, or were you still looking back toward your father?

A. I would look ahead and I would look back after him off and on,—not too long either way. I would sit there and look ahead and back at him.

Q. 46. Did you see this truck at any time before the collision occurred?

A. Yes, sir, I did.

Q. 47. Where was the truck when you first saw it and what was it doing?

A. The first time I saw it, I looked ahead, it was on its side of the road, and I remember a signal light blinking. He was on his side of the highway, and I just—after I saw that—I looked back at my father, and the next time I looked around he was coming across the highway in front of us.

Q. 48. How close were you to him when the truck was coming across the highway in front of you?

A. Practically on him, practically. I say seventy-five feet or say something like that.

page 21 } Q. 49. What did Mr. Honaker do when this truck pulled across the highway in front of him?

A. About the time—

By Judge Lively: We object to that. That is a suggestive question. Let the witness tell what took place.

Which objection the Court overruled, to which ruling of the Court the defendants, by counsel, at the time excepted.

A. About the last time I looked around and saw the truck and it was running across the highway in front of us I *holloed* "J. E." About the same time he seemed like he hit the brakes, and the truck didn't look like it was stopping, and then it was all, practically before I knew it—J. E. tried to turn out of the highway and hit the curb. He did try to avoid—it was too far over in our lane.

By Judge Lively: We object to the witness stating—

By the Court: State what he did and not your opinion why he did it.

Q. 50. Which way did he cut his car?

By Judge Lively: Let the witness tell.

By Mr. Gillespie: That is what I am asking him.

Willard Nicholson.

By Judge Lively: We object because it is leading and suggestive—which way did he cut his car, and assuming he did something.

By the Court: The witness just stated he tried to turn out. The witness stated that, so I think the next question is proper.

Which way did he turn?

page 22 } The objection is overruled.

To which ruling of the Court the defendants, by counsel, excepted.

A. He turned right-hand.

Q. 51. To the right of the highway in the direction you were traveling?

A. Yes, sir.

Q. 52. Now, could you tell where you were in the highway at the time the collision took place?

A. Oh! We were practically off the highway. We were not over three or four feet on our side of the highway when we hit, I would say.

Q. 53. I want to show you a map which has been introduced in evidence as Plaintiff's Exhibit No. 1, and ask you to examine that map and see if it appears to you to show the highway there in the vicinity of where this accident took place.

A. Yes, sir, it does.

Q. 54. Now, would you point out on the map, for the benefit of the jury, approximately the position of the car in which you were riding at the time of the collision?

A. Well, we were right on this curb here at this Texaco Service Station here.

Q. 55. And that is the curb at the West entrance of the Texaco Service Station?

A. Yes, sir, right about there.

Q. 56. Now, which part of the truck and which part of the automobile collided?

A. Well, the front of the truck, he was at an

page 23 } angle, more or less, the left front of the car where the bumper hooks on—those two big eye beams stick out from the bumper and hook on—the driver's side,—the side of the car just forward of the left front door.

Q. 57. Was any part of the front of the automobile damaged or involved in that collision in any way?

A. No, sir.

Willard Nicholson.

Q. 58. Did you have occasion to see the automobile immediately after the accident?
A. Yes. I walked around it several times.
Q. 59. The first time you saw this truck there in its own side of the highway, was it moving or stopped at that time?
A. If it was moving it was awfully slow. It was slow if it was moving.
Q. 60. At the time you saw it, just before the collision, did you watch it from the time you saw it there right up to the point of collision?
A. Yes, sir.
Q. 61. Did the truck ever slow up or make any effort to stop?
A. He might have about the time of the impact.
Q. 62. What did you say?
A. He might have at about the time of the collision. I don't know. I would not say for sure.
Q. 63. Once it started across the highway it kept going?
A. It kept going until we hit it.

By Judge Lively: Objection to counsel suggesting to the witness.
page 24 } By the Court: Don't lead the witness.

Q. 63. Mr. Nicholson, I hand you a picture and ask you to examine it and see if you recognize the subject shown in that picture?
A. Yes, sir.
Q. 64. What is it?
A. You are speaking of the car or the man?
Q. 65. Do you recognize the car?
A. Yes, sir.
Q. 66. Whose automobile is that?
A. That is Mr. Honaker's car. The Pontiac.

By Mr. Gillespie: Now, if your Honor please, these pictures have already been introduced in evidence. We would like to exhibit them to the jury. They have been introduced in evidence in another case.
By the Court: Let me see just a moment.
By Mr. Gillespie: We would like to introduce them unless Court and counsel for the defendants have some objections.
By Judge Lively: Let's see the pictures. We don't know what they are.
By the Court: Suppose we take a short recess.

Willard Nicholson.

Thereupon a recess was taken and some time after which the jury returned into the jury box.

By Mr. Gillespie: I would like to withdraw these pictures from the file in the other case and offer them in
page 25 } evidence in this case.

By the Court: All right, sir. One will be Plaintiff's Exhibit No. 2 and the other will be Plaintiff's Exhibit No. 3.

Thereupon the first picture offered was filed and marked for identification as "Plaintiff's Exhibit No. 2" and the same is placed in the Court file in this case.

Q. 67. Mr. Nicholson, I hand you another picture and ask you if you recognize the subject in that picture?
A. Yes, sir, it is the same automobile. Mr. Honaker's automobile.
Q. 68. The one that was involved in this accident?
A. Yes, sir.

By Mr. Gillespie: We offer this picture in evidence as Plaintiff's Exhibit No. 3.

Thereupon the picture so offered in evidence was filed and marked for identification as "Plaintiff's Exhibit No. 3" and the same is placed in the Court file in this case.

Q. 69. Mr. Nicholson, do you recall whether or not there was other traffic on the highway at the time of or just before this collision occurred?
A. Yes, sir.
Q. 70. Where was this other traffic?
A. We had passed some coming up the hill, and then just—I could not say what kind of cars they were or what it was behind—there was some vehicles behind the truck, coming up behind it.

Q. 71. The road there, was it curving with the
page 26 } car in which you all were riding?

A. Yes, sir.
Q. 72. Where was the truck immediately after the accident?
A. It was sitting across the highway in approximately the same spot where we hit.
Q. 73. Was it straight across or at an angle, Mr. Nicholson?

A. A slight angle.

Q. 74. Where was the front of the truck?

A. Well, the left front was only three or four feet, roughly, I would say, from the right-hand curb,—the right-hand curb on our side.

Q. 75. That is on your side?

A. Yes, sir.

Q. 76. You mean it was South or North of the right-hand curb? Was it toward the gas station or over toward the center of the road from the curb?

A. Toward the gas station.

Q. 77. Three or four feet you say?

A. Yes, sir.

Q. 78. Where was your automobile, or where did it stop; what was its position?

A. Well it spun around one time and was headed back in the direction in which it had come.

Q. 79. And about how far away from the truck was it?

A. I don't exactly—forty or fifty feet, somewhere along there.

Q. 80. How long was it after that that your father and Mr. Honaker were taken to the hospital?

page 27 } A. It didn't seem like ten minutes. I don't know exactly but it was not long.

Q. 81. You were not injured in the accident?

A. No, sir.

By Mr. Creasy, a Juror:

Q. 82. Was all the truck on the highway after the truck stopped?

A. Yes, sir.

Q. 83. All of the truck was still on the main highway?

A. Yes, sir.

By Mr. Gillespie:

Q. 84. Let's take this map again in answer to Mr. Creasy's question. Can you point out on the map the approximate angle of the truck and what portion of the highway the truck was occupying?

A. It was sitting at an angle something like that.

By the Court: Let him take a pencil, if he can and draw it there. I think that will be better.

By Mr. Gillespie: Come over here, Mr. Nicholson, and draw it in.

Willard Nicholson.

Q. 85. Now, is that approximately the angle of the truck immediately after the accident, Mr. Nicholson, as you recall?
A. As far as I can recollect, yes, sir.
Q. 86. Do you know where the rear end of the truck was with reference to the center of the road?
A. Well, this corner was still back over the center line.
Q. 86. And where was the front of the truck?

By the Court:
Q. 87. That is the right rear corner you mean?
page 28 } A. The right rear corner of the truck.

By Judge Lively:
Q. 88. The right rear corner was where?
A. It was still across the center line. The left front corner was three or four feet—maybe a foot more or less—from the left-hand curb,—his left-hand curb, our right-hand curb.

By Mr. Gillespie:
Q. 89. Now, if these blocks along here are the edge of the highway, had the front of the truck reached into the driveway, leaving the highway, or not?
A. No, sir.
Q. 90. It was still out into the road?
A. Yes, sir.
Q. 91. Then the left front of the truck was out in the highway, or South of the sidewalk?
A. Yes, sir.
Q. 92. As you recall?
A. Yes, sir.
Q. 93. What kind of a truck was this?
A. A ten wheel job is all I know. One of those big fellows, what make it was I don't remember.
Q. 94. What would you estimate its length to be?
A. Gosh, I would be afraid to say.
Q. 95. You mean it had two wheels in front?
A. Yes.
Q. 96. And tandem wheels in the rear?
A. Yes, sir.

page 29 } CROSS EXAMINATION.

By Mr. Shufflebarger:
Q. 1. Referring to Plaintiff's Exhibit No. 1, upon which you have proposed to draw a sketch of the truck operated by the

defendant, Charles Mundy, is the part nearest the block after which the words "Texaco Service Station" appear,—the front end of the truck?

A. Yes, sir.

Q. 2. You say at the time of the accident or after the accident that the front of the truck was in that position?

A. Yes, sir.

Q. 3. Well, was it in that position at the time of the impact and was it still in that position after the accident?

A. Yes, sir.

Q. 4. And there is some three or four feet between the front of that truck and the side walk?

A. I would say that, roughly, yes, sir,—so far as I can remember.

Q. 5. The right rear wheel?

A. I didn't say the wheel.

Q. 6. The right rear corner?

A. Yes, sir.

Q. 7. Of the truck was still on the South side of the white center line of the highway?

A. Yes, sir.

Q. 8. Mr. Nicholson, you are the same Willard Nicholson who testified in the case before this Court on the 25th of November, 1957, are you not?

page 30 } A. Yes, sir.

Q. 9. I will ask you whether or not you were asked the question: "Where was the truck?" And you answered: "It was sitting, completely blocking our lane of travel."

A. Yes, sir.

Q. 10. If it was completely blocking your lane of travel, then it could not be three or four feet back from the edge of the side walk?

A. You could walk around it; you could not drive around it.

The plaintiff, by counsel, objected to the foregoing question because it is purely argument.

By the Court: The witness is on cross examination.

Q. 11. Was it three or four feet South of the South edge of the sidewalk or was it completely in your lane of travel?

A. It was blocking the car's lane of travel.

Q. 12. Was it completely blocking your lane of travel?

Willard Nicholson.

A. I don't get your point. It was completely blocking the car's lane of traffic. You would probably have enough room to walk around it.

Q. 13. Does it take three or four feet for you to walk around in front of a vehicle?

A. No, sir.

Q. 14. You stated it was three or four feet away from the sidewalk?

A. I said there was no sidewalk as I remember.

Q. 15. Two or three feet away from the curb?

A. Yes, sir.

page 31 } Q. 16. How much of the rear end of the truck was sticking out into the East bound traffic lane?

A. I don't know, sir, exactly. There was some of it. I didn't go right over to the truck.

Q. 17. How close did you get to it?

A. Maybe ten or fifteen feet, somewhere along there.

Q. 18. Now, you were there in an accident in which your father had been seriously injured?

A. Yes, sir.

Q. 19. Mr. Honaker had been injured?

A. Yes, sir.

Q. 20. You were more interested in their welfare than the position of the truck?

A. Yes, sir, I was.

Q. 21. You never went back over to look at the truck?

A. Not completely over there, no, sir. I looked at the truck from that distance. I didn't go over and look in to see how bad it was hurt.

Q. 22. Where was the truck hit?

A. Looked like the left front end. It was more or less on the left front fender and the hood and the front *humper*.

Q. 23. Both cars were hit on the left side?

A. Yes, sir.

Q. 24. Was there any contact on the right-hand side of the Honaker car?

A. From the truck?

Q. 25. That is right.

A. No, sir.

page 32 } Q. 26. Was there any contact at all on the right-hand side of the truck from the Honaker car?

A. Not to my knowledge, no, sir.

Q. 27. There was no contact on the right-hand side of either motor vehicle?

A. No, sir.

Willard Nicholson.

Q. 28. You say that Mr. Honaker was driving with his lights on?
A. Yes, sir.
Q. 29. How do you know?
A. I saw him turn them on.
Q. 30. When did he turn them on?
A. When we left Amonate.
Q. 31. When you left Amonate?
A. Yes, sir.
Q. 32. About where, when you left Amonate?
A. It was still in town there.
Q. 33. Still in town?
A. Yes, sir.
Q. 34. Do you know whether or not he cut those lights off?
A. No, sir, I could not say.
Q. 35. Now, you don't know whether the lights were burning at the time of the accident or not, do you?
A. Seems to me—well, truthfully I don't guess I do—seems like they were burning when I got out of the car; when I walked around seems like the lights were still on. When I could not get him out of the car I got in a state of shock, more or less I guess. Seems like they were on. The
page 33 } siren was going and the radio in there was blaring, and I was walking around the car and it seems like they were on.
Q. 36. You were excited?
A. Yes, sir.
Q. 37. About in a state of shock yourself?
A. After a while.
Q. 38. I believe you had to have a sedative yourself after you got to the hospital?
A. After I saw the condition of my father.
Q. 39. You remember Mr. Honaker turning his lights on before you left Amonate, and you could not say whether they were on immediately before that accident?
A. Truthfully, no, sir.
Q. 40. You say he had a siren on the car?
A. Yes, sir.
Q. 41. And did you state, on direct examination, that the reason you knew that was because he was using the siren every time he came upon some cars and passed them?
A. Yes, sir.
Q. 42. So he would open up the siren and pass cars and then cut it off?
A. He kept it on.

Willard Nicholson.

Q. 43. How?
A. The siren can be heard for quite a time after you cut it off.
Q. 44. He did cut it off?
A. Yes, sir.
Q. 45. From time to time?
page 34 } A. Yes, sir.
Q. 46. And he didn't run with it open all the time?
A. No, sir.
Q. 47. Do you remember whether or not he turned it on when he was going through the town of Cedar Bluff?
A. No, I don't.
Q. 48. I believe you remember that he passed some traffic outside of Cedar Bluff?
A. Outside, yes, sir.
Q. 49. He turned it on when he passed them?
A. Yes, sir.
Q. 50. Then he cut it off?
A. Well now, I know after he got out of the town of Cedar Bluff, it was all the way up that hill, he had it on and when he topped out he had it on.
Q. 51. What was the occasion of having it on?
A. Passing traffic.
Q. 52. Passing traffic?
A. Yes, sir.
Q. 53. Where was the traffic along that road, Mr. Nicholson?
A. There was several cars on that hill we passed.
Q. 54. Which way were they going?
A. The same direction we were.
Q. 55. Did you meet any?
A. Yes, sir.
Q. 56. Going toward Cedar Bluff?
A. Yes, sir.
Q. 57. How many?
page 35 } A. I don't know, sir, exactly.
Q. 58. About how many?
A. Four or five maybe.
Q. 59. Four or five going East. How many ahead of you going West?
A. Three or four, possibly, we passed,—I don't remember off hand.
Q. 60. After you passed them there was no other traffic ahead of you?

Willard Nicholson.

A. Not to my knowledge.

Q. 61. Not to your knowledge?

A. No, sir.

Q. 62. Now, I believe you said, coming up the hill out of Cedar Bluff—between Richlands and Cedar Bluff—your father passed out?

A. Yes, sir.

Q. 63. Up to that time, while you were riding in the front seat, you were sitting on one leg, leaning back over the seat administering to your father and rubbing his arms.

A. Yes, sir.

Q. 64. If you were taking care of your father as you testified you were, can you explain why you are so positive about the amount of traffic you passed from Cedar Bluff to Richlands?

A. These three or four cars we passed going up the hill were two cars together, and the others coming down—I remember they pulled off the highway. I remember that the highway is more open than between Cedar Bluff and Amonate. We met very little traffic between Cedar Bluff and Amonate.

page 36 } Q. 65. Did it up set you when you realized your father had passed out there between Richlands and Cedar Bluff?

A. In a way. I sort of figured it was from the sedative, or whatever the Doctor gave him.

Q. 66. It did give you some concern?

A. Yes, sir.

Q. 67. Did you tell Mr. Honaker your father had passed out?

A. I don't remember.

Q. 68. Did you tell him to hurry and get him to the hospital?

A. I didn't tell him to hurry up any more.

Q. 69. You figured he was doing all right?

A. I figured he was doing all right.

Q. 70. You figured he was doing all right. I believe you stated, going up the hill, at the crest of the hill, he was driving fifty-five or sixty miles an hour?

A. He started picking up speed there.

Q. 71. He was going between fifty-five and sixty miles an hour?

A. I guess that is what he would be doing.

Q. 72. That is after he passed the crest?

A. He had not been doing that much going up it.

Q. 73. You said so on direct examination.

Willard Nicholson.

A. He asked me after we topped over the hill. We picked up speed then. We were not nearly doing that much when we passed these cars.

Q. 74. Did you ever look at the speedometer?

A. No, sir,—I may just glanced.

Q. 75. You do know he was going pretty fast?

A. Yes, sir.

page 37 } Q. 76. You do know, after he crossed the crest of the hill, he was going between fifty-five and sixty miles an hour, maybe more than that?

A. Possibly.

Q. 77. Sir.

A. Possibly.

Q. 78. Now, you say, after you topped the hill, you saw the truck with its blinker lights on?

A. I don't say right at the top of it. When I looked around I could see ahead of us and saw the truck.

Q. 79. How far away was the truck at that time?

A. It was a considerable distance.

Q. 80. Approximately how far?

A. I am not much judge of measurements, I don't know. We were eight—nine hundred feet.

Q. 81. You saw the truck eight or nine hundred feet?

A. Something like that.

Q. 82. I believe you say at that time if it was moving, it was moving awfully slow?

A. Yes, sir. I glanced around and saw the truck and the light,—I remember seeing it.

Q. 83. Where was the light on that truck?

A. It was under the head light.

Q. 84. Which side, or the front of the truck?

A. It was on the left hand side, the driver's side.

Q. 85. The left hand side of the truck?

A. Yes, sir.

Q. 86. Indicating a left hand turn?

page 38 } A. Yes, sir.

Q. 87. And you plainly saw that a great distance away?

A. Yes, sir.

Q. 88. And then you say you looked back? You looked back toward your father.

A. Yes, sir.

Q. 89. And what was your father doing then?

A. He was very quiet all the time. I had his hand in my hand.

Willard Nicholson.

Q. 90. All the time you had his hand in yours?
A. Yes, sir.
Q. 91. Now, when you looked and saw the truck the first time, maybe eight hundred feet away, you saw it had its signal light on, signalling for a left hand turn. Do you know which way Mr. Honaker was looking?
A. No, sir, I don't.
Q. 92. Was there anything to keep Mr. Honaker from seeing that truck and the signal light on it?
A. None that I know of.
Q. 93. Did you observe any traffic between your car and the Mundy truck?
A. No, sir.
Q. 94. So the whole distance then was clear?
A. I believe it was.
Q. 95. At that time what side of the road was the Mundy Truck on?
A. He was on his side.
Q. 96. On his side of the road?
page 39 } A. Yes, sir.
Q. 97. And on what side of the road was the Honaker car?
A. On our right hand side.
Q. 98. And that was about the time or right after you topped over the crest of the hill?
A. Yes, sir.
Q. 99. From that point Mr. Honaker had continued to increase the speed of his car?
A. I don't know if he did or not.
Q. 100. He increased it considerably over what it was coming up the hill?
A. Not considerable,—somewhat.
Q. 101. You say it was going fifty-five or sixty miles an hour or even more?
A. I don't know.
Q. 102. That is what you stated.
A. It possibly could have been. Yes, sir.
Q. 103. Then when was the next time you saw the Mundy truck?
A. When I looked. I was looking at my father, I turned back around again and looked and I saw the truck coming across the highway in front of us.
Q. 104. How far were you away from the truck at that time?
A. Seventy-five to eighty feet.

Willard Nicholson.

Q. 105. Seventy-five to eighty feet.
A. Yes, sir.
Q. 106. And what was Mr. Honaker doing?
A. I don't know.
Q. 107. How about his speed? Had he slowed down any?
A. He was doing about the same, I guess.
page 40 } Q. 108. Doing about the same?
A. Yes, sir.
Q. 109. When you saw the truck cutting across there in front of you, as you said some seventy-five or eighty feet in front of you, what did you do, if anything?
A. I holloed his name, I said "JE" is all I could say.
Q. 110. Then how quickly after that did the impact occur?
A. I don't know. It was not long.
Q. 111. It was just about like that?
A. I had time to brace myself.
Q. 112. Now, was there any conversation at all between you and Mr. Honaker about your father's condition as you were coming up the hill there before dropping over the crest in front of Wimpy Jones'?
A. Not that I can remember.
Q. 113. And was there any conversation between you and Mr. Honaker after you topped the crest of the hill, and or about the time you observed the Mundy truck eight hundred feet in front of you?
A. I might have told him that he had passed out. I don't remember. That has been a long time ago. I can't remember too well whether I said anything to him or not.
Q. 114. Now, after you observed the Mundy truck, with its signal light on, you stated that you looked back to see about your father?
A. Yes, sir.
Q. 115. And you were still holding his hand?
page 41 } A. Yes sir.
Q. 116. And how long was it before you turned back around and saw the truck again?
A. I could not tell you exactly. I don't know exactly.
Q. 117. Just a matter of moments?
A. Well, eight hundred feet,—you can count seconds I guess.
Q. 118. Just a few seconds?
A. I don't know how many seconds, not minutes, because we were too close to start with—eight hundred feet,—you can proceed pretty fast.
Q. 119. Just a matter of seconds from the time you looked

back at your father and turned back and looked to the front, and at that time you were only seventy-five or eighty feet from the Mundy truck? Now, where was the Honaker car at the time of this impact, Mr. Nicholson?

A. Where was it?

Q. 120. Yes, sir, with reference to the road, sidewalk, service station, driveway or any other physical point?

A. Well, the car was partly off the highway at the time we hit.

Q. 121. What part of the car was off the highway?

A. The right front wheel,—I would say the right front.

Q. 122. Where was it with reference to the hardsurface, the asphalt?

A. It was off the asphalt.

Q. 123. The right front wheel.

A. It was off the highway.

page 42 } Q. 124. It was off the highway?

A. As near as I can remember, yes, sir.

Q. 125. Do you know whether any other part of the Honaker car was off the highway?

A. Maybe the rear wheel where we hit the curb. The curb there is built up along the highway.

Q. 126. Actually where the impact occurred was at the driveway into an entrance here where there is no curb?

A. He hit the curb, the corner of it there.

Q. 127. Why did you hit the curb?

A. I don't know why he hit it.

Q. 128. Did he apply his brakes?

A. Yes, sir.

Q. 129. Had he applied his brakes when you looked around the last time?

A. About the time I holloed he applied the brakes.

Q. 130. When he applied the brakes what happened?

A. He turned right handed I guess, trying to miss the truck.

Q. 131. Did the brakes respond to the application of pressure on the foot pedal?

A. You could hear the tires crying, if that is what you mean.

Q. 142. Were all four wheels sliding?

A. I don't know.

Q. 143. You could hear the tires crying, and the car was sliding, was it not?

A. I don't remember.

page 43 } Q. 144. It was sliding at an angle, was it not?

A. I don't know.

Willard Nicholson.

Q. 145. You said it turned to the right?
A. If it was sliding, it possibly was.
Q. 146. It was sliding sideways, was it not?
A. I don't know.
Q. 147. You don't know?
A. No, sir, I don't.
Q. 148. You were in the front seat of the car, were you not?
A. Yes, sir.
Q. 149. You were watching what was going on?
A. If you could call it that, I was.
Q. 150. You saw the truck in front of you?
A. When you see something like that you can't remember every detail,—what goes on.
Q. 151. You can't remember every detail?
A. No, sir. It happened so quick, I just can't remember every little thing, and it has been a long while back.
Q. 152. You could be mistaken about the position of the car in the road at the time of the impact, could you not?
A. When I saw the truck it was sitting approximately where we hit it. It had not been moved.
Q. 153. So it must have been going pretty slow?
A. The truck?
Q. 154. Yes.
A. Yes, sir.
Q. 155. After the impact I believe you stated the Honaker car went on into the graveled parking area of the
page 44 } Piggly-Wiggly turned around, headed back East and came to a stop about fifty feet from the front of the truck?
A. Somewhere along there.
Q. 156. Mr. Nicholson, referring to Plaintiff's Exhibits Nos. 2 and 3, which you have testified are different pictures of the Honaker car,—
A. Yes, sir.
Q. 157. It appears in Plaintiff's Exhibit No. 2 that the left door of that car is on the car, but the picture of the same side of the car as shown in Plaintiff's Exhibit No. 3 indicates a hole there in the side, with no door. Can you explain that?
A. No, sir.
Q. 158. Was the door torn off the car in the impact?
A. That is the way it was after the impact.
Q. 159. I believe you said you tried to get Honaker out of the car?
A. My door was open.

Q. 160. On the right hand side?

A. Yes. It flew open and I was hanging out the door, hanging onto the seat, and when he stopped I reached across the seat to pull him out, and asked him to help me get father out. I looked back at my father and this part was down next to his head, and he was bleeding at the mouth. I reached over to get Honaker out and Honaker said: I can't move. Don't bother me.

Q. 161. And does the first picture, Plaintiff's Exhibit No. 2, which shows the door on the car, correctly portray the car afterwards?

A. Yes, sir, to my knowledge.

page 45 } Q. 162. Do you know when this second picture, Plaintiff's Exhibit No. 3, was taken?

A. No, sir, I don't.

RE-DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Mr. Nicholson, you say the first time you looked down the road and saw this truck headed East, with the left directional signal light burning, was there any traffic between you and this truck at that time?

A. To my knowledge I don't believe there was.

Q. 2. Was there anything to keep the driver or operator of that truck from seeing this automobile, in which you were riding, going down that road toward Richlands?

A. No, sir.

* * * * *

page 46 } GAINES F. WILLIAMSON,

another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Profitt:

Q. 1. Please state your name.

A. Gaines F. Williamson.

Q. 2. What is your age

A. Forty-one.

Q. 3. Where do you live?

A. Cedar Bluff, Virginia.

Gaines F. Williamson.

Q. 4. Can you describe the location of your home; where it is?

A. Where I live at the present time,—I live right at the foot of the hill.

Q. 5. Go ahead.

A. Just through the cut at the new bridge at the Sargent Produce Market.

Q. 6. That is on the East end of Cedar Bluff?

A. Yes, sir.

Q. 7. Where did you reside on September 2, 1956?

A. That is the date of this accident?

Q. 8. Yes.

A. That was at Jones Chapel.

Q. 9. Did you live to the North or South of Route 460?

A. That would be to the North.

Q. 10. How far do you live from Route 460, from the hard top road?

A. Well, distance in feet I would not know. I
page 47 } would say about three to four minutes walk.

Q. 11. What is your visibility from your house? Where can you see from your house to a point beyond?

A. I can see a portion of the highway there and a few of those houses beyond the highway.

Q. 12. Are you acquainted with the plaintiff, Mr. Honaker?

A. Yes, sir.

Q. 13. How long have you known him?

A. I could not say the number of years. He was a police for the coal company in the camp where I worked for the coal company; he is a police there. I been with this company eighteen years.

Q. 14. Have you known him the most of that time?

A. Sir. I could not say. I could not make a statement on how many years I have known him.

Q. 15. Did you see Mr. Honaker on the day of this accident?

A. Yes, sir.

Q. 16. Describe for the Court and jury where you saw him and what the circumstances were?

A. On this morning I was on my front porch reading the Bluefield paper and I heard this siren, and that attracted my attention, I looked up and saw his car going down the highway.

Q. 17. In which direction?

A. That was going in a Westwardly direction I would say.

Q. 18. Toward Richlands?

A. Yes, sir.

Q. 19. Could you tell whether or not, from your advantage point, whether the lights were on on this vehicle or not?

A. No, sir, I didn't notice anything like that.

page 48 } Q. 20. You say you saw his car. Were you familiar with his car prior to that time?

A. Yes, sir. I recognized his car. I could not say who was driving the car at that time.

Q. 21. You did recognize his car?

A. Yes, sir.

Q. 22. For what period of time did you hear the siren?

A. I could not hardly say to that. When the car goes on out of my sight I could still hear the siren, and I heard this crash and I could still hear the siren from where I was sitting.

Q. 23. From the time you saw the car until you heard the crash you could hear the siren?

The defendants, by counsel, objected.

A. Yes, sir.

By Judge Lively: Let the witness testify.

By the Court: Go ahead.

To which ruling of the Court the defendants, by counsel, at the time excepted.

Q. 24. Mr. Williamson, how far is your home from the crest of the hill where you get to the high school and start down the hill again?

A. I would not hardly know that.

Q. 25. Just an approximate statement as to how far it is?

A. Well, I would say, if I understand where you are speaking about there, I would say that from there to where I was living at that time was approximately half the distance to the highway.

Q. 26. Can you state, in feet, how far that would be?

A. No, I could not.

page 49 } Q. 27. Can you estimate it for us?

A. I am a poor judge of that.

Q. 28. Tell me this. In order to get to your house, assuming you are coming from Cedar Bluff, do you turn to the East or West of Jones Chapel to your right?

A. Right at the cemetery there. I live in that hollow right beyond the cemetery.

Q. 29. Is that the hollow between Jones Chapel and the new high school?

A. No, sir, that hollow is to the right from the highway. It is North of the high school I would say.

Q. 30. Can you see from where you were living at that time—could you see the crest of the hill; that is, where it crests to turn coming from Cedar Bluff and starts down toward Richlands?

A. Yes, I can see where it comes up and makes the turn.

Q. 31. The Honaker car,—did you follow it from that point or what place in the highway did you see it? Where was it when you saw it?

A. I say, when I noticed it, it was at the crest of the hill, about at that point when I first took notice of it.

Q. 32. Can you make any statement, for the benefit of the jury, as to how fast this automobile was traveling?

A. Well, I could not do that. I would say that what attracted my attention was the siren, or, in other words, I would have never noticed the automobile.

Q. 33. You are not able to say what his speed was?

A. No, sir.

page 50 } CROSS EXAMINATION.

By Mr. Shufflebarger:

Q. 1. Mr. Williamson, I am not exactly clear as to where you were living on the day of this accident with reference to the highway and with reference to Jones Chapel. Can you describe the house?

A. You are familiar with some of those people there at that place? Fulton Stamper, would you know where he lived there right at the mouth of this hollow?

Q. 2. Let's go back to Jones Chapel. Going from Cedar Bluff towards Richlands, you didn't live in that house on top of the hill before you get to Jones Chapel?

A. No, sir.

Q. 3. That is not the house?

A. No, sir.

Q. 4. You pass Jones Chapel and then there is a road that turns off of Route 460 to your right?

A. Yes, sir.

Q. 5. There is a cemetery and the chapel on the right?

A. Yes, sir.

Q. 6. How far up that road from Route 460 do you go before you come to your house?

Gaines F. Williamson.

A. When you pass through by those cemeteries it would not be over three or four hundred feet until the hollow leads back North.

Q. 7. You go up that road and then there is a road that turns off North?

A. Yes.

page 51 } Q. 8. That is North of the cemetery?

A. Yes, it would be.

Q. 9. It is in the opposite direction from the high school?

A. The high school, it is a little to the right of the line of the highway,—the part of the highway I was speaking of.

Q. 10. As you leave Route 460 you go up the road, the old Jones Chapel road?

A. Yes, sir.

Q. 11. And about three or four hundred feet this hollow commences on the right?

A. Yes, sir.

Q. 12. And you lived in a house up this hollow?

A. Yes, sir.

Q. 13. How far up that hollow did you live?

A. I could not say in feet how far, but I could walk from where I lived—there is a little market across the highway—in three to four minutes time will put me across the highway to the market.

Q. 14. That would be coming straight?

A. Yes, coming out the way we walked out of there.

Q. 15. When you walked out of there do you go in the driveway in front of the school building, or down the Jones Chapel road and up Route 460?

A. This highway—it is just a little old mud road—you come out just a few feet left of the entrance of the high school building.

page 52 } Q. 16. In other words, you more or less walk straight from your home across there to the market?

A. Almost a straight walk.

Q. 17. And the market is on the other side of the crest of the hill?

A. Yes, sir.

Q. 18. You say it took you about four minutes to walk from your home, at that time, to that market?

A. Yes, approximately that time.

Q. 19. From the front porch of the house where you were sitting you observed this about which you have testified here. How much of the highway can you see, Mr. Williamson?

Gaines F. Williamson.

A. Well, I could not say. You can see a good deal of the top of the hill there, but I would not know just the number of feet.

Q. 20. Your vision is more or less limited to the highway, pavement, on the top of the hill?

A. Yes, sir.

Q. 21. You can't see far, back down toward Jones Chapel, from there?

A. No, sir.

Q. 22. The hill blocks your view looking that way, does it not?

A. The way the porch set on the house, that would more or less take my view from the left on back toward the Cedar Bluff side.

Q. 23. The distance of the highway that was in your view, then, would be as long as this court room is deep?

A. Yes, sir,—it would be several times that length. I would say across the street or further.

page 53 } Q. 24. Then, for the record, what would you estimate that that would be, Mr. Williamson?

A. In feet?

Q. 25. Yes, sir.

A. I would say approximately three hundred feet.

Q. 26. Now, when you were sitting on the porch you state that your attention was directed to the highway by hearing the siren of the car?

A. That is right.

Q. 27. And you looked toward the highway, and was the car already then in sight?

A. When I looked I saw the car, yes, sir.

Q. 28. It was already within that three hundred feet you would say?

A. When I looked up I seen the car.

Q. 29. Where, in reference to this three hundred foot view of the highway, was it?

A. Sir, I could not say.

Q. 30. Was it half way within your vision?

A. I would not say because I didn't pay enough attention to.

Q. 31. You were not thinking you were going to have to testify?

A. I was not giving it any consideration.

Q. 32. You were not paying any attention to it at that time. You heard the siren and looked down and saw the car, and what kind of a car was it?

A. It was a Pontiac.

page 54 } Q. 33. What color?

A. A tan, cream, something like that you would call it.

Q. 34. It was like the car that you knew Mr. Honaker had at that time. Did you know definitely it was Mr. Honaker's car?

A. No, sir, I would not swear to the car.

Q. 35. Was that a siren on top of the top, or where was the siren?

A. That I could not say.

Q. 36. Do you know where the siren was on Mr. Honaker's car?

A. No, sir.

Q. 37. Now, which direction was that car going in, Mr. Williamson?

A. Toward Richlands, coming out of Cedar Bluff to Richlands.

Q. 38. Did you see any other cars in that space of the highway that was within your vision?

A. I didn't pay any more attention. When I looked up and saw that car and it traveled on I dropped on back to my paper.

Q. 39. You paid no more attention to the car or its speed, or whether or not there were any cars in front or behind it or meeting it, or any other traffic on the highway?

A. No, sir, I didn't.

Q. 40. And then you say you heard the crash?

A. Yes, sir.

Q. 41. Was it a loud crash?

A. Well, no, it didn't sound too loud.

Q. 42. Did you leave your home and go to the scene of this accident?

page 55 } A. Yes, sir.

Q. 43. You say that you heard the siren after you heard the crash?

A. Yes, sir.

Q. 44. Was it blowing very long?

A. It just seemed as it was squealing, more or less, after the crash.

Q. 45. Did the siren continue to blow from the time it left your sight until after the crash?

A. Yes, sir.

Q. 46. Why do you know that?

A. Well, I could hear it.

Gaines F. Williamson.

Q. 47. You paid no attention to the highway after you looked up and saw the car, is that right? Is that your testimony?

A. That is right.

Q. 48. You paid no more attention to the speed?

A. That is right.

Q. 49. You paid no attention to whether there were any other cars on the highway?

A. Right.

Q. 50. You looked down and started reading your newspaper again?

A. Right.

Q. 51. Why did you pay attention to the fact that the siren continued to blow?

A. When I heard the crash.

Q. 52. Then you heard the siren after the crash?

A. That is right. It continued.

page 56 } Q. 53. If you didn't pay attention to the siren until after the crash, than you can't state definitely it was on from the time it topped the hill until after the accident?

A. I would stake my life on it that it was.

Q. 54. You say, after the crash, it sort of had a squealing sound?

A. That is right.

Q. 55. How is that in comparison with the way it was sounding before?

A. Well, I would not hardly know how to give you an imitation on it.

Q. 56. How soon after the crash did the tone of the siren change?

A. Now, I could not say as to that.

Q. 57. But it did change from the sound it was making before?

A. Yes, sir.

Q. 58. But you can't say how long after the crash before its tone changed?

A. No, sir.

Q. 59. Did it change before the crash?

A. No, sir.

Q. 60. How do you know?

A. I was sitting there. I could hear it blowing.

Q. 61. You were sitting there reading your newspaper?

A. That is right.

Gaines F. Williamson.

Q. 62. And not paying any attention to anything going on on the highway?

A. A man can hear a good deal and still be look-
page 57 } ing at his paper.

Q. 63. Were you just looking at your paper or were you reading your paper?

A. Ordinarily when you pick a paper up you read.

Q. 64. Were you reading or looking at it?

A. That is what I was doing at the time the siren attracted my attention.

Q. 65. It attracted your attention and you looked and was not impressed and went back to reading your newspaper?

A. It didn't mean anything to me.

Q. 66. It didn't mean anything to you.

A. That is right.

Q. 67. And you were not impressed. How much longer, after the crash, did that siren continue to blow?

By Mr. Gillespie: He has been over this thing two or three times. We don't want to make any unnecessary objections. We think there ought to be a limit to the same question and the same line of questions that they put to this witness some time or other.

By the Court: Let him state how long the siren sounded after the accident.

A. That I could not answer. My car is down below the house and I went and got in and went over there. It stopped blowing by the time I got my car and got over there. Someone turned it off, or something happened it didn't continue blowing.

Q. 58. Where was your *par* parked?

A. One hundred feet from the house I would say.
page 58 } Q. 59. Was it parked on the Jones Chapel road?

A. Up in the hollow.

Q. 60. Which way was it headed?

A. That I could not say.

Q. 61. That you could not say?

A. That is right.

Q. 62. You don't know whether you had to back out or turn around?

A. I could not answer that one.

Q. 63. And yet you know the siren was still blowing at that time? What was you answer to that?

A. Sir.

Thereupon the preceding question was read by the reporter as reported—Question: "And yet you know the siren was still blowing at that time?"

A. At the time I started to go over to where the accident happened, yes, sir, I know that.

Q. 64. And it was still blowing at the time you got in your car and started the motor? Right.

A. It was blowing whenever I got in my car and started over there. Before I got there some one had stopped it. It was squealing.

Q. 65. It was still blowing when you left your house?

A. Yes, sir.

Q. 66. When you got over there what did you find?

A. Well, I got there I found the ambulance there.

Q. 67. Ambulances have sirens, don't they?

A. Yes, sir.

page 59 } RE-DIRECT EXAMINATION.

By Mr. Proffitt:

Q. 1. When you got there was the siren blowing on the ambulance?

A. No, sir. The ambulance was in the lot parked.

RE-CROSS EXAMINATION.

By Mr. Shufflebarger:

Q. 1. There was no siren of any kind blowing?

A. When I got there, no, sir.

Q. 2. Do you know how long the ambulance had been there before you arrived?

A. It could not be long; they could not be there long.

Q. 3. How many ambulances were there then?

A. I could not say.

Q. 4. Was there one or more than one?

A. There was bound to be two or more.

Q. 5. Were there two?

A. There were two or more.

Q. 6. There were two or more and they were all there when you got there?

A. I don't know if any came up after I got there. I tried to help the ambulance—

Q. 7. When you got there there was at least two there?

A. There was at least two when I got there.

Henry Macil McGlothlin.

* * * * *

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HENRY MACIL McGLOTHLIN,
another witness being introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Would you please state your name?
A. Henry Macil McGlothlin.
Q. 2. Do they some times call you Macil McGlothlin?
A. Yes, sir.
Q. 3. Where do you live?
A. Richlands, Virginia.
Q. 4. How old are you?
A. Thirty.
Q. 5. How long have you lived in Richlands?
A. Around. I believe June, 1957 I moved back over there.
Q. 6. What is your business?
A. Trucking.
Q. 7. Did you own a truck on September 2, 1956?
page 92 } A. Yes, sir.
Q. 8. What kind of a truck?
A. Well, I owned two trucks—two '55 GMC.
Q. 9. Two 1955 GMC trucks. What size tonnage were they?
A. Two ton.
Q. 10. What kind of bodies or beds did they have?
A. Dump beds, coal dumps.
Q. 11. How many wheels did they have?
A. Well, they call them—they were straight trucks and I had had dead axles put under the truck.
Q. 12. By that you mean tandem wheels?
A. Yes, sir,—trailingaction they call it.
Q. 13. Did you take one of your trucks to Hayes Richlands Metal Products to have any work done on it a day or two prior to September 2, 1956?
A. Yes, sir.
Q. 14. Do you remember which one it was?
A. Yes, sir, the green GMC '55—titled '56. It was a '55 model bought in January.

Henry Macil McGlothlin.

Q. 15. What did you take that truck there for?

A. To have the bed lengthened or shortened. It has been so long I have forgotten. I believe it was to have the bed lengthened.

Q. 16. When did you take it there, do you recall?

A. The Saturday before the following Sunday that it was wrecked. The day before.

Q. 17. The day before?

A. Yes, sir.

page 93 } Q. 18. On Saturday?

A. Yes, sir. I took it down there on Saturday the best I remember. Sunday was when the accident occurred.

Q. 19. Did Hayes Richlands Metal Products work on Saturday and Sunday, or do you know?

A. They used to work on Saturday frequently. They didn't work on Sunday. I never did know of them working on Sunday.

Q. 20. Who did you see to make arrangements to have the work done on the bed of the truck?

A. Charley Mundy I believe,—I would not say. I saw Spicer Johnson and Charley Mundy was the one that done the work.

Q. 21. Who is Spicer Johnson?

A. He was the foreman.

Q. 22. And what was Charley Mundy's job?

A. I believe at that time he was installation man.

Q. 23. Did you tell these people what you wanted done to the truck?

A. Yes, sir.

Q. 24. Did they agree to do it?

By Judge Lively: What people?

By Mr. Gillespie: He said he was talking to Charley Mundy and Spicer Johnson.

By Judge Lively: I understood him to say he believed he was talking to Charley Mundy.

A. I said I talked to Charley Mundy. I believe I talked to Spicer Johnson also, but I think the way it was—I am pretty sure Spicer Johnson told me to see Charley and see if I could get Charley to do it. Charley didn't want to do it on Saturday. He said: If I don't get to it I will fix it

page 94 } tomorrow. I said: It don't make any difference to me when you fix it.

Henry Macil McGlothlin.

A. Yes, sir.
Q. 37. Who was that?
A. Charley Mundy, at the time of the accident.
Q. 38. And you say at the time you made arrangements for the work to be done that he was installation foreman for Hayes Richlands *Metral* Products?
A. I believe he was. I believe that is the job he held at the time, installation man.
Q. 39. He was employed by them?
A. Yes, sir, he was employed by Hayes.

CROSS EXAMINATION.

By Judge Lively:
page 96 } Q. 1. What were his duties as installation foreman?

The plaintiff, by counsel, objected to the foregoing question.

By the Court: If the witness knows, he can state.

A. It is like I say, I am not sure the job he held. I believe he was installation foreman. I think that takes care of mounting hoists.
Q. 2. What he was doing on your truck was extending the bed, making it longer, was it not?
A. I think so.
Q. 3. You know that is right?
A. I said either extending it or shortening it, I had both done to the truck. It is hard to remember whether it was extending it or shortening it.
Q. 4. Was there anything else he was to do to the truck beside extending the bed or shortening the bed?
A. No, sir, not to my knowledge.
Q. 5. Was the truck new or practically new?
A. Well, sir, the truck was not bought until January, 1956 and that was September, 1956. It was a pretty new truck. It was about eight month's old.
Q. 6. Was it in good condition?
A. Yes, sir.
Q. 7. All the fixtures in good shape, except you wanted the bed extended or shortened?
A. Yes, by having them trailing axles put on I had to have the bed extended.

Henry Macil McGlothlin.

Q. 25. Do you remember what time of day you were talking to Charley Mundy or Spicer Johnson, or both of them, if you talked to both of them?

A. No, sir, I don't. I could not recall whether it was before noon or after.

Q. 26. You do recall it was on Saturday?

A. Yes, sir.

Q. 27. And did Charley Mundy or Spicer Johnson, or both of them or either of them agree with you that they would do this work on your truck there at that time?

A. Well, it is like I said, I tried to get him to do it Saturday afternoon, and he said if he didn't get to it he would fix it the next day.

Q. 28. Who was it that told you that?

A. Charley told me he didn't want to work on it that afternoon, which was Saturday, he would rather do it the next day. I told him it didn't make no difference.

Q. 29. While you were there making this arrangement with him to fix your truck was anything said then as to when you would get it or how it would be picked up after it was repaired?

A. Yes, sir. I told Charley Mundy when he finished with the truck to call C. & S. Service Station at the top of the hill at Wimpy Jones and they would come and get it.

Q. 30. And did he agree to fix the truck and call these people at the service station?

A. Yes, sir.

Q. 31. Where were you going?

page 95 } A. Darlington, South Carolina.

Q. 32. I believe you were going down there to some automobile races?

A. Yes, sir.

Q. 33. When did you expect to get back to Richlands?

A. Well, the day after the wreck—the day after Labor Day, Tuesday morning. The day after Labor Day whatever day it was on.

Q. 34. These races would take place on Labor Day?

A. Yes, sir.

Q. 35. Now, when you got back was it then that you discovered for the first time your truck had been involved in a wreck?

A. Yes, sir.

Q. 36. Did you learn who was operating your truck at the time?

Henry Macil McGlothlin.

Q. 21. Did you give Mundy or any one else any authority there at Hayes Richlands' place of business to take that truck anywhere else?

A. No, sir.

Q. 22. Did Charley Mundy or any one else there undertake to deliver that truck to any place—any place else or take it away from there to any other place?

A. Repeat that, please.

Q. 23. Did Mundy or any one else connected with Hayes Richlands Metal Products Corporation agree or have any understanding with you to take this truck to any other place after it was done or before it was done?

A. The truck was not to be moved. They was to work on it, and Bill Harrison or Max Smith was to pick the truck up. There was nothing said about taking it nowheres.

page 99 } Q. 24. Hill Harrison and Max Smith—

A. Bill Harrison runs the C. & S. Service Station, at that time, and Max Smith worked there. Bill Harrison was to be off and I told Max Smith, and he said he would get it when he called.

Q. 25. You don't remember very clearly about your conversation with Spicer Johnson?

A. No, sir, I don't. I am pretty sure I talked to Johnson about it, because I always did because he was the foreman.

Q. 26. Do you remember whether that was Friday or Saturday?

A. Seemed like it was on Friday I went and asked them. It was on Saturday that I taken the truck over there. I do remember I talked with Charley Mundy on Saturday.

Q. 27. Mr. Johnson is the foreman at the place?

A. Yes, sir.

Q. 28. He is the supervisor of Charley Mundy?

A. Yes, sir.

Q. 29. In other words, he was the superintendent or agent in charge of the place?

A. Yes, sir.

Q. 30. Was there any other person there when you took this truck to the place of business of Hayes Richlands Company except Charley Mundy—when you took the truck there?

A. I am not positive. I would not say for sure. I think there were more men working that day.

Q. 31. You testified in this case heretofore, didn't you?

A. Yes, sir.

Henry Macil McGlothlin.

Q. 8. And in order to get this bed extended or
page 97 } shortened you took this matter up with either
Spicer Johnson or Charley Mundy, or both of
them?

A. Yes, sir, both I believe.

Q. 9. What you got them to do and all you got them to do was to extend or shorten the bed of the truck?

A. To the best of my knowledge that is all I remember.

Q. 10. It didn't need anything else?

A. No, sir.

Q. 11. The brakes all right?

A. Yes, sir.

Q. 12. All the lights were all right?

A. Yes, sir.

Q. 13. The tires all right?

A. Yes, sir, so far as I know the tires were all good.

Q. 14. And they were to do this or they agreed to do this on Saturday, you say?

A. No, sir. Like I said, they didn't agree to do it on Saturday. Charley Mundy had something else to do. I wanted it done on Saturday. He said he would rather fix it on Sunday. I said: I wanted it the next work day.

Q. 15. It would have been Tuesday?

A. Tuesday, I believe.

Q. 16. Labor Day was Monday?

A. Yes, sir.

Q. 17. Did you expect to get home to go to work Tuesday?

A. Yes, sir.

Q. 18. And did you have any contract or understanding
with Hayes Richlands Metal Products Corporation
page 98 } to do anything to this truck in any way other than
to extend or shorten this bed?

A. Not that I remember of.

Q. 19. That is correct. Is your memory right clear on that?

A. My memory is clear on that part of it, if there was anything else I don't remember it beside that.

Q. 20. What was to be done with the truck when it was completed according to your arrangements with Hayes Richlands Metal Products Corporation?

A. He was to call C. & S. Service Station. I went and saw them—after leaving the truck I went directly to the Service Station and told Bill Harrison to go get the truck when Charley called. Bill said: I won't be here tomorrow, tomorrow is my day off, so I told Max Smith.

Charles Mundy.

A. A rough guess. I would not say whether the cab was six or seven feet. I never did measure it.

Q. 8. About twenty feet?

A. Yes, sir.

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CROSS EXAMINATION.

By Judge Lively:

Q. 1. You need not sit down without you want to. You spoke of making arrangements to have this truck of yours serviced. Were those arrangements with the Hayes Richlands people or somebody else?

A. No, C. & S. Service Station about the greasing.

Q. 2. The only contract or agreement you had with Hayes Richlands people was to lengthen this truck bed?

page 105 } A. Yes, sir.

Q. 3. Nothing else?

A. That is right. So far as I can remember that is all there was.

* * * * *

CHARLES MUNDY,

one of the defendants, being called on behalf of the plaintiff as an adverse witness, testified as follows after being first duly sworn:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Your name is Charles Mundy and you are one of the defendants in this suit?

A. Yes, sir.

Q. 2. You were employed by Hayes Richlands Metal Products Corporation on September 2, 1956?

A. Yes, sir.

Q. 3. I believe you were an installation foreman?

A. Yes, sir.

Henry Macil McGlothlin.

Q. 32. I am going to ask you whether or not you
page 100 } were asked this question by counsel: "I believe
you said that when you went there on Saturday afternoon with the truck to the place of business of Hayes Richlands Metal Products that Charley Mundy was the only person there?" Answer: "I believe he was, yes, sir." Were you asked that question and did you make that answer?

A. I don't remember, no, sir. That is the reason I would not say whether he was the only one or was not, because it is too far back.

Q. 33. Do you remember exactly what instructions, or what statements you made to Charley Mundy?

A. Well, when you get right down to the exact words, after this long a time, no, sir, I could not say the exact words that I said that long ago. This was 1956 and this is 1959,—that is too far.

RE-DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Mr. McGlothlin, who was going to do this work on your truck?

A. Charley Mundy.

Q. 2. And you do recall telling him that you wanted the truck greased and the oil changed at the C. & S. Texaco Service Station?

A. Yes, sir, I think I testified to that.

Q. 3. In making your arrangements with him to fix your truck, you also arranged with him to call this service station when he finished?

A. Yes, sir. I drove my car and went in per-
page 101 } son to tell them.

Q. 4. Can you tell us approximately how long this truck was?

A. Over all?

Q. 5. Yes.

A. Well, sir, the dump was twelve and we lengthened it to that, I believe, eight inches.

Q. 6. Eight inches?

A. Yes, sir, and it made the truck too heavy at the back. I don't remember how many inches we were putting in. It is so long, I say around thirteen,—I say around twenty feet over all.

Q. 7. From the end of the tail gate to the front bumper?

Charles Mundy.

Q. 4. And you recall Mr. McGlothlin bringing his truck to the place of business of your employer?

A. Yes, sir.

Q. 5. The day before to have an extension put on the bed?

A. Yes, sir.

page 106 } Q. 6. And you agreed with him to put that extension on during Saturday afternoon and Sunday?

A. Yes, sir.

Q. 7. And he told you after you had finished that he wanted to have the truck serviced?

A. Yes, sir.

Q. 8. And you agreed to either call the people up at the C. & S. Service Station or take the truck up there for servicing?

A. I agreed to take the truck up there.

CROSS EXAMINATION.

By Judge Lively:

Q. 1. Did you have any authority or directions from Hayes Richlands Company to take this truck up to the C. & S. Service Station?

A. No, sir.

Q. 2. Who gave you authority to take it up there?

A. Mr. McGlothlin.

Q. 3. What were you to do on this truck as an employee of Hayes Richlands Company?

A. I was to put a—I believe it was eight or nine inch extension in the back of the body next to the tail gate to balance the loads.

Q. 4. Were you to do anything other than that as an employee of Hayes Richlands Company?

A. No, sir.

Q. 5. Did you do that work that you were employed to do as an employee of Hayes Richlands Company? Did you do that?

A. Yes, sir.

page 107 } Q. 6. When did you do it and when did you complete it?

A. Sunday about noon.

Q. 7. What did you do then?

A. I closed up the shop and took the truck to C. & S.

Q. 8. Did you call C. & S.?

Charles Mundy.

A. No, sir.

Q. When you completed your work of putting this extension on, you closed up the shop and locked it. Did you have anything further to do for Hayes Richlands Metal Products Corporation?

A. Not that day, sir.

RE-DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. When did you start working on the truck?

A. Saturday morning.

Q. 2. And you finished, you say, about noon Sunday?

A. Finished at noon Sunday.

Q. 3. Was there anybody there at the plant but you on Sunday?

A. No, sir.

Q. 4. You had the keys?

A. Yes, sir.

Q. 5. In full charge?

A. Well, I was working. I was never in full charge of the shop.

Q. 6. There was nobody but you there on Sunday?

A. No, sir.

Q. 7. And nobody but you there on Saturday
page 108 } afternoon.

A. No, sir.

Q. 8. And you were a foreman at the time?

A. Installation foreman.

RE-CROSS EXAMINATION.

By Judge Lively:

Q. 1. What do you mean by installation foreman? What were your duties and what were your rights?

A. I do mechanical work and over-see the installation of the hoisting bodies on the trucks.

Q. 2. And all you had to do in connection with Mr. McGlothlin's truck was to do the mechanical work of extending that truck bed?

A. Yes, sir.

Q. 3. And was that a part of your duties as installation foreman?

A. No.

Q. 4. Why did you do that?

Charles Mundy.

A. Well, as a favor to Macil, and I needed the money.

Q. 5. And I believe you say that work was completed about 12:00 o'clock when you locked up the shop?

A. Yes, sir.

Q. 6. Did you have any further duties to perform that day for Hayes Richlands Metal Products Company?

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. You said you did this work on the truck as a favor to Macil?

page 109 } A. Yes, sir.

Q. 2. And he asked you to do it and you agreed to do it because he was a friend of yours?

A. Yes, sir.

Q. 3. And at the time you made the arrangements to do the work on the truck, he also made arrangements with you to take the truck up to be serviced. That was also a favor to Macil?

A. Not at the same time, he didn't. He come back.

Q. 4. You did both as a favor to Macil?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Judge Lively:

Q. 1. Mr. Mundy, did you have any agreement or understanding with McGlothlin to take this truck to C. & S. Service Station at the time you took this work to do for Hayes Richlands, or did that come later?

A. That come later.

Q. 2. How much later?

A. On Saturday afternoon.

Q. 3. Was the taking of this truck up to C. & S. Service Station any part of the contract or agreement with McGlothlin?

By Mr. Gillespie: Objection. It is asking for a conclusion. We think that he can testify as to what happened and let the jury draw their own conclusion.

By the Court: Let the witness state the facts, what happened.

J. E. Honaker.

Q. 4. Now in the original contract-agreement
page 110 } between Hayes Richlands and McGlothlin to do work on this truck, was this taking of the truck to C. & S. Service Station any part of that contract or agreement?

By Mr. Gillespie: Objection for the reasons heretofore assigned.

By the Court: Let him state the facts.

Q. 5. All right. Go ahead.

A. When he first brought the truck in,—not then. He came back late Saturday evening and found out I could not possibly get it through, and I told him I would finish it on Sunday. He asked me to take it up there and get the truck serviced for him, that he was going to South Carolina.

* * * *

J. E. HONAKER,

the plaintiff, a witness introduced on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Proffitt:

Q. 1. Your name is J. E. Honaker?

A. Yes, sir.

Q. 2. Where do you live?

A. I live at Amonate on the West Virginia side.

Q. 3. How long have you lived at Amonate?

A. Since 1948.

Q. 4. What is your occupation?

A. I am a part time deputy sheriff in Tazewell County, Virginia and a conservator of the peace in McDowell County, West Virginia.

page 111 } Q. 5. In other words, your authority extends on both sides of the line?

By Judge Lively: That is objected to. He can state what offices he holds.

A. Yes, sir.

J. E. Honaker.

By Mr. Gillespie: We withdraw that question if it is going to be objected to by counsel.
By the Court: All right. Go ahead.

Q. 6. How long have you been in your present office as an officer?
A. I came to Amonate in 1944 or 1945; I went into the Navy and came out in 1946, I spent about thirteen months in the Navy, and got my job back and I have been there since.
Q. 7. The same job you now hold?
A. Yes, sir.
Q. 8. What is your present age?
A. Forty-two.
Q. 9. Are you married?
A. Yes, sir.
Q. 10. Do you have children?
A. I have a boy and a girl.
Q. 11. Are they married?

By Judge Lively: That is objected to because prejudicial.

Which objection the Court overruled, to which ruling of the Court the defendants, by counsel, at the time excepted.

Q. 12. Are your children married?
A. My daughter is married. My son is not.

page 112 } By Judge Lively: Same objection.

Q. 13. On September 2, 1956 at approximately eleven or twelve o'clock—between those hours—where were you?
A. Approximately around 11:30 I was at the community building,—it is the restaurant at Amonate company store.
Q. 14. Who else was present?
A. Well, there was Willard Nicholson, Mac Nash and a boy that represented the—and two or three coming and going.
Q. 15. Was this on a Sunday?
A. Yes.
Q. 16. Did you on that occasion and on that day see Mr. Nicholson the father of Willard Nicholson?
A. I did.
Q. 17. Tell the jury what the circumstances were about your seeing him?
A. Well, sir, I was standing in the restaurant drinking an *organge* pop and Mr. Nicholson came in the back door. I seen

him coming up, approaching me, and I noticed he was awful pale and prespiring. I said: Bob, what is the matter? He said: Sheriff, get me to the Doctor as quick as you can. His son was there. We got him by the arms and taken him out to my car and put him in the front seat, with Willard, his son, and myself. He got in the middle.

Q. 18. Where did you go from there?

A. To the Doctor's office, which is, I would say five or six hundred feet.

Q. 19. And what was the Doctor's name?

A. R. I. Flemming.

page 113 } Q. 20. What happened when you got to his house?

A. He come out and examined Mr. Nicholson and ran over to his office, just across the creek, and got his satchel and come back and gave him a shot. When he gave him a shot he told us to put him in the back seat, and he said get him to the hospital as quick as I could.

Q. 21. Did he tell you where to take him?

A. No, sir. I taken it for granted he would go to the Clinic.

Q. 22. Did you immediately leave Amonate?

A. I did, sir.

Q. 23. What route did you follow when you left Amonáte?

A. Come to Bandy and over to Busthead and on into Cedar Bluff where I hit Route 460.

Q. 24. Were you driving your car?

A. I was.

Q. 25. It was your automobile?

A. Yes, sir.

Q. 26. How far is it from Amonate to the point where the collision occurred?

A. Well, sir, I have never exactly checked it into Richlands, on down into Richlands from Amonate they claim it is about sixteen miles.

Q. 27. That is to Richlands?

A. Yes, sir.

Q. 28. You went on by Cedar Bluff?

A. Yes, sir.

Q. 29. What traffic, if any, did you encounter

page 114 } after you got on Route 460?

A. After I got on Route 460—started through Cedar Bluff there was not any traffic, and I drove up and started around the curve—I started up the hill and I believe there was about three cars in front of me, just driving along

normal like—I would call Sunday drivers on a day like that.

Q. 30. Did you or not pass these cars?

A. I did. I reached over and turned my siren button and pulled it down and left it.

Q. 31. Had you had occasion prior to that to use the siren?

A. Yes, sir. I had passed two or three cars going over before I got to Cedar Bluff.

Q. 32. After you got onto Route 460 in Cedar Bluff, during the time you were passing these cars on the West end of Cedar Bluff, at what speed were you traveling?

A. Well, sir, I would say coming through Cedar Bluff I was doing around forty to forty-five miles an hour coming through Cedar Bluff, and then I caught up with these other cars and my car was missing awful bad, it would not, I don't guess, have done over sixty miles an hour flat going up the hill,—it was popping and cracking.

Q. 33. Did you meet any traffic?

A. I met two cars. They seen me coming with my lights on. I was dimming my lights up and down, and they pulled off, and these cars was the last ones I passed there right at the Church.

Q. 34. Jones Chapel?

A. They pulled in there.

Q. 35. Well, at that point where you passed the last car, what was your speed?

page 115 } A. I would say I was doing about fifty miles an hour.

Q. 36. After you passed that series of three cars, was there any other traffic?

A. No, sir.

Q. 37. You had clear road?

A. Yes, sir. I was approaching the top of the hill.

Q. 38. I don't know if I asked you. Who was in the front seat?

A. Willard Nicholson.

Q. 39. Mr. Nicholson was in the back seat?

A. Yes, sir, he was, with his head lying right in the corner behind me.

Q. 40. Could you tell anything about his condition or how he was faring?

A. I knew that he wanted to raise up several times before we got into Cedar Bluff and Willard was rubbing his arms and hands and trying to get him to lay down, and about the time we got into Cedar Bluff Willard made the remark that he had done got easy.

J. E. Honaker.

By Judge Lively: Objection to that.

By the Court: Don't state the conversation. Tell what you did and what happened.

Q. 41. Willard was in the front seat with you?

A. Yes, sir.

Q. 42. Please state to the jury, as you approached the crest of this hill near the Richlands high school, what you observed at that point?

A. Well, sir, when I passed the last car, going

page 116 } on there, entering the top of the hill, the road was open around that curve and I knew there at Wimpy Jones is a congested area, so I left the siren down. When I topped there I could see the straight-a-way and there was nothing on down to that long curve in below Wimpy Jones on my side of the road at all. There was not anything there.

Q. 43. Did you see anything on the other side of the road?

A. Yes, sir. I seen this big truck sitting down there. He had his left turn signal on. I was watching him. I thought sure he would sit there, that he had heard my siren, and there was cars coming up from behind him, and I kept my eye on him until he started to cross the road.

Q. 44. Let me ask you this, before we get to that point. From the time you came over the crest of the hill and could see, how far is it from that point to where this truck was sitting, or your approximate idea of it?

A. I would say in the neighborhood of six or seven hundred feet, something like that.

Q. 45. From where you could first see him?

A. Yes, after I topped up where I could see the bed first.

Q. 46. I believe you made the statement that on your side of the road you could see nothing?

A. There was nothing, my side was clear.

Q. 47. Was there any other traffic between you when you saw this truck, the Mundy truck?

A. Coming up from the truck, coming East?

Q. 48. Yes.

A. No, sir, not that I seen.

page 117 } By Judge Lively: I didn't get that. Read that question and answer, please.

Thereupon the reporter read the question and answer as requested.

J. E. Honaker.

Q. 49. From your position, when you came over the crest of the hill, could you see the truck coming?

A. Yes, sir.

Q. 50. And was there any reason why the truck or the operator of the truck could not see you?

A. No, sir. I don't see why he didn't see me.

Q. 51. When you first saw the truck was it moving or standing still?

A. I could not tell at that distance. When I first topped there and seen it I could not tell whether he was coming or sitting still, and I looked around, but as I glanced on down I could tell, by watching him, he was sitting there.

Q. 52. You soon learned he was sitting still?

A. Yes, sir.

Q. 53. How far were you from this truck when you saw the truck begin to move?

A. I would say I was about one hundred fifty feet from it.

Q. 54. What did the truck do?

A. He just pulled right across the road. He turned and started right out in my lane.

Q. 55. When you saw that happen what action did you take, if any?

A. I hit my brakes,—I had good brakes on the car, and they froze. I mean all four wheels locked and I went page 118 } to sliding. I seen I was going up under that big bed. By that time he had advanced, I say, two-thirds out in my lane, across my lane and I cut it to the right as far as I could. It just kept on sliding. I knew I went up over the curb, on the upper side, that goes in the driveway,—got my front end over there—my right front—it hit the curb and busted a tire and wrapped it around the frame of the truck.

Q. 56. You say your front wheel was up on the curb?

A. Yes. I had the front end of my car up on the sidewalk.

Q. 57. Where was this point of impact with reference to the driveway into the Service Station, was it East or West?

A. It was the lower driveway.

Q. 58. The one closer to Richlands?

A. That is right, the West driveway.

Q. 59. Now, where was your automobile struck?

A. Well, it struck right in—it hit right in, oh, behind the front wheel and the left fender and took the side out.

Q. 60. This picture has already been introduced in evi-

dence. Does that represent, or is that your automobile in that picture?

By the Court: Identify that for the record as Exhibit two or three.

Q. 61. The first one is Plaintiff's Exhibit No. 2.
A. Yes, sir, that is my car.
Q. 62. And this is Plaintiff's Exhibit No. 3. Is that also your automobile?
A. Yes, sir.
Q. 63. There is apparently some question about
page 119 } that door in Plaintiff's Exhibit No. 3. Do you know whether or not the door is on in that picture or whether it has been removed?
A. The door is on. That is where it was prized open. You can see the way it was before.
Q. 64. In other words, the picture is taken from an angle?
A. Yes, sir.
Q. 65. You might show the jury that point,—the door is still there?
A. Right here is the door.

By the Court: Speak so the reporter can get what you are saying.

A. You can tell, on the angle the picture is made, that the door is open.
Q. 66. Do you know what portion of the truck was damaged or what portion of the truck hit your automobile?
A. Left front fender. I didn't know but I was told it was the left front fender. I don't know what was torn up.
Q. 67. You didn't see the truck afterwards?
A. Only that I could look up from where I was at. When my car had stopped the truck was sitting in the road.
Q. 68. Do you know what position the truck was in in the highway?
A. Only that the front end of it was right at the entrance that goes into the Service Station's West entrance there and the back end of it—it had the whole lane blocked.
Q. 69. Was it sitting straight across the highway?
A. No, sir, I would say more on kind of a forty-
page 120 } five degree.
Q. 70. At that time, when you saw the truck

from your car, do you know whether or not the truck had been moved?

A. No, sir, that was right after the impact. I don't know whether it had been moved or not.

Q. 71. What happened to your automobile after the collision?

A. Do you mean what garage—

Q. 72. Where did your car go?

A. They taken it to the City Motor Company.

Q. 73. Immediately after the impact where did your car go?

A. The car went in a spin half around and half end ways heading toward the Piggly-Wiggly. That front tire busted and then I didn't have any control of it. It stopped where it wanted to, and my siren was still on and my lights were still on and the motor was still running.

Q. 74. When did you turn your lights on?

A. When I left Amonate.

Q. 75. Were you conscious; were you still conscious after this collision?

A. Yes, sir.

Q. 6. What was your condition while you were still there in the car?

A. Well, sir, my car stopped. Mr. Nicholson, Willard, the boy that was with me, his right front door flew open, he was hanging on, and my car was going in a spin. When it stopped he stepped out on the ground and ran to the back and looked at his father, and the side panel, right at his head, was bent right over to Mr. Nicholson's head. He came back to me and by that time several had done begun to run out, page 121 } and that siren still screaming, and my legs were crossed and I was sitting two-thirds of the way over in the seat and I could not get to the button and three or four were trying, and I told him to shut that button off and then the siren quit. Willard said: Come out and help me get father out, I believe he is killed. I told him I could not move, I was hurt too, I didn't know how bad.

Q. 77. Did you stay in that position?

A. Yes. Some boy got in by the side of me and held me up, and blood begun to run down my face. I didn't know how bad I was hurt, and he stayed there and held me until the ambulance came, and then several of them got around me and laid me on the stretcher.

Q. 78. How about your speed from the time you came over the top of the hill up to the point where you began to apply

your brakes. Can you state what your speed was at that point?

A. I say I was doing, when I turned over the hill and seen nothing was there, and judging the truck would sit there, I was doing between fifty-five and sixty, because the car was missing awfully bad.

Q. 79. Where were you taken?

A. I was put in the ambublance, and I called to chief of police, Mr. Garner—in the ambulance with me—and told him to get my guns and tools out of my car and keep them and to call the City Motor Company to come and get the car, and they started to the hospital with me. I had been—all of us—going to the Clinch Valley Clinic and Mr. Farmer was driving to Mattie-Williams, and I told him not to take me up there, to take me to the Clinic.

Q. 80. How did you feel at that point?

page 122 } A. At that time the shock had begun to set up quite a bit.

Q. 81. Did you have any pain?

A. No, sir, not too much, just shock.

Q. 82. When, if ever, did you start having any pain as a result of this collision?

A. Well, really the most pain I had, I think, was the next day. They kept me doped up pretty much. I didn't suffer too much.

Q. 83. What time of day was it when this happened?

A. Somewhere in the neighborhood of 12:00—12:15, something like that.

Q. 84. You were at the Clinch Valley Clinic. How long did you stay there?

A. Well, sir, I was in there so much I would have to—I have a note here with the days and all on it that I was in and out of the hospital.

* * * * *

page 131 } Q. 154. Please state where the damage was that was done to your automobile? What part of your car?

A. On the left side.

Q. 155. Was there any damage to the front end of your car?

A. None that I know of. Just the left side.

* * * * *

J. E. Honaker.

page 132 } CROSS EXAMINATION.

By Judge Lively:

Q. 1. Mr. Honaker, I believe you were on your way from Amonate to Richlands at the time that this accident occurred?

A. Yes, sir.

Q. 2. And you had a siren on your car?

A. Yes, sir.

Q. 3. You had passed several people on the way coming over and had blown this siren on those occasions?

A. Yes, sir.

Q. 4. And then when you passed the people you cut your siren off?

A. Yes, sir.

Q. 5. In other words, you had turned this siren on to get people out of the way and as quick as that was accomplished you would cut your siren off?

A. Yes, sir.

Q. 5. Now, prior to arriving at the place of this accident you say you passed some people coming up the hill as you go from Cedar Bluff to Richlands?

A. Yes, sir.

Q. 6. Overtook several and passed them and met some and passed them?

A. I passed three cars I believe, sir.

Q. 7. Going in the same direction you were?

A. Yes, sir.

Q. 8. And how many coming in the opposite direction?

A. I am not positive. I believe there was two page 133 } that pulled off on their side of the road.

Q. 9. And all those cars, the three going in your direction and the two you were meeting, were met by you as you went up the hill from Cedar Bluff toward Richlands?

A. Yes, sir.

Q. 10. And then you got on top of the hill pretty soon after that?

A. Yes, sir.

Q. 11. Reached the summit of the hill and at that time you looked and you could see a long distance in front of you, could you not?

A. Yes, sir.

Q. 12. Fifteen or sixteen hundred feet?

A. It is a long distance.

Q. 13. A straight stretch, and there were no cars on your side of the road at all, you say?

J. E. Honaker.

A. No, sir.

Q. 14. There was no occasion for you to have your siren on after you had passed these cars and after you reached the top of the hill you could see the clear road ahead of you for a long distance?

A. Yes, I would say that would be—

Q. 15. What was it?

A. It is a congested area there at Wimpy Jones and down through the Piggly-Wiggly.

Q. 16. There were no cars in the road, were there?

A. No, sir.

Q. 17. And that is what you had been using
page 134 } your siren for was to get cars out of the road?

A. Yes, sir.

Q. 18. You had no occasion to use it on this strip of road?

A. Yes, sir, I would say I did.

Q. 19. You didn't have any for that purpose?

A. Not on my side of the road, no, sir.

Q. 20. You say this is a congested area there?

A. Yes, sir.

Q. 21. You mean by that that there is lots of traffic?

A. Going in and out.

Q. 22. To Wimpy Jones' restaurant and to the Piggly-Wiggly and so on—these other buildings?

A. Yes, sir.

Q. 23. You knew that?

A. Yes, sir.

Q. 24. And this accident, I believe you say, happened almost in front of the Wimpy Jones restaurant?

A. No, sir, I would say it was below Wimpy Jones.

Q. 25. How much?

A. Approximately one hundred fifty feet.

Q. 26. One hundred fifty feet below?

A. Yes, sir.

Q. 27. You were still in the congested area?

A. Yes, sir.

Q. 28. Now, when you reached the top of this hill, you saw a car or a truck—saw a motor vehicle in this straight stretch ahead of you.

A. He was on his side of the road, facing me.

page 135 } Q. 29. I didn't ask you where he was. I asked you if you saw a motor vehicle in this road?

By Mr. Gillespie: Objection. We think he is entitled to tell what he saw.

J. E. Honaker.

By the Court: Don't argue with the witness. That is a proper answer he gave you.

Q. 30. I want to ask him if he saw the car ahead?
A. He was on ahead of me; he was ahead of me, he was not in front of me.
Q. 31. He was not in the North lane of traffic?
A. No, sir.
Q. 32. He was in this straight stretch ahead. About how far ahead of you?
A. I say six or seven hundred feet down there.
Q. 33. You testified about this before, and I believe you said about five hundred feet?
A. It is somewhere in that neighborhood.
Q. 34. And you also saw this man had his lights, or signal light blinking as you got to the top of the hill? You saw him sitting down in the road in front of you and saw this signal light blinking?
A. I did, sir.
Q. 35. At that time was he standing still or was he moving?
A. When I first saw him I could not tell whether he was standing still or moving up slowly.
Q. 36. You could not tell?
A. No, sir.
Q. 37. Whether he was moving or still standing?
page 136
A. That is right.
Q. 38. You did see his left signal light giving a signal?
A. Yes, sir.
Q. 39. And that signal indicated to your mind that he was going to make a left turn at once?
A. That is what I thought, yes, sir.
Q. 30. You also knew that if he made a left turn in accordance with what this light indicated, he would come across your lane of travel?
A. That is correct sir, yes, sir.
Q. 31. Now, about what speed were you making after you got to the top of this hill and started on down this straight stretch, and after you saw this car and its signal light?
A. Well, sir, I would—
Q. 32. This truck,—I mean truck instead of car.
A. I would say I was doing approximately fifty-five miles an hour.
Q. 33. You testified before in this case, didn't you?
A. Yes, sir.

J. E. Honaker.

Q. 34. Or in these occurrences. At that time didn't you state you were making between fifty-five and sixty miles an hour?

A. After I got on over the hill and seen my way clear, yes, sir, and I was watching the truck.

Q. 35. You turned over the hill and you were making fifty-five to sixty miles an hour?

A. After I got over the top I had picked up some speed when I got in front of Wimpy Jones' place.

page 137 } Q. 36. You were not making that much speed until you got on top of the hill?

A. No, sir.

Q. 37. In other words, you increased your speed when you saw the truck in front of you with its lights blinking for a left turn?

A. I thought he would stay there.

Q. 38. I am not asking you what you thought?

By Mr. Gillespie: We object to counsel arguing with the witness.

By the Court: The witness is on cross examination and counsel has a right to answers responsive to the questions. I think the witness should have the right to explain the answers he makes.

A. I thought he had seen me as I had seen him.

By Judge Lively: That is objected to and a motion is made to strike it out because it is not responsive. I am asking him if he increased his speed after he saw the truck sitting there with its lights blinking.

By the Court: I thought he answered that question.

Thereupon the question: "You were not making that much speed until you got on top of the hill?" was read as was the answer thereto: "No, sir."

By the Court: He has answered the question. If he wants to explain he has the right to do that.

page 138 } By Judge Lively: We don't object.

By the Court:

Q. 39. Answer the question whether or not you did increase your speed at the top of the hill?

A. I did, yes, sir.

J. E. Honaker.

By Judge Lively:
Q. 40. You had, at that time, after you saw this signal—you had plenty of time to have brought your car under control,—reducing the speed and brought it under control?

By Mr. Gillespie: Objection. There is no evidence his car was not under control.

Q. 41. After you saw the signal from this truck for a left turn, didn't you.

By the Court: Objection has been made to the question. I think it might be a question of fact for the jury to pass on, whether or not it was brought under control or operated properly.

To which ruling of the Court the plaintiff, by counsel, at the time excepted.

Thereupon the foregoing question was read.

A. Yes, sir, I had my car under control.
Q. 42. I didn't understand your answer.
A. I said: Yes, sir, I had my car under control at that time.

By Judge Lively: We except and move to strike out the foregoing answer.
By the Court: I will have to overruled the motion.

page 139 } Q. 43. Maybe I didn't get the question as clear as I should. Mr. Honaker, the question I asked you is this: After you saw this—after you reached the top of the hill as you came toward the place of the accident, and after you saw the signal light of the McGlothlin truck blinking and giving a signal which you understood to mean a left-hand turn of that truck across your lane of this highway, didn't you, at that time, and thereafter have plenty of time to bring your car under control so you could have stopped it before reaching the place of this accident?

By Mr. Gillespie: Objection for the reason whether or not he had his car under control is a question for the jury,

and the question is so worded that it creates a conclusion which is not stated in the evidence in this case.

By the Court: He is on cross examination. He answered a similar question to that just before.

To which ruling of the Court the plaintiff, by counsel, at the time excepted.

Q. 44. Now, will you answer that question.

Thereupon the preceding question was read as reported.

A. Certainly I had plenty of time. I had it under control. When I got down there he had not turned across the road on me, sir, when I first saw him.

Q. 45. What distance could you have stopped your car, if you had your car under control?

A. I could have stopped it in a reasonable distance.

Q. 46. What do you mean by a reasonable distance?

A. I say I could have stopped it in one hundred feet.

Q. 47. One hundred feet?

page 140 } A. Yes, sir.

Q. 48. You were a good deal more than one hundred feet away from him when you saw him?

A. Yes, sir. I had increased my speed then.

Q. 49. How fast were you going then?

A. I say between fifty-five and sixty.

Q. 50. Between fifty-five and sixty miles an hour. And how much distance would it have required to stop your car when you were going fifty-five or sixty miles an hour, and when you were in one hundred fifty feet of him?

A. I would say it would take me one hundred fifty feet or more to stop then.

Q. 51. One hundred fifty feet or more?

A. Yes, sir, at that speed, sir.

Q. 52. This signal kept on blinking showing his purpose to make a left-hand turn, as you went on down the road?

A. Yes, sir, as I approached him. Yes, sir.

Q. 53. In other words, the signal never stopped, it kept on?

A. Not that I know of,—it was still blinking.

Q. 54. Now, when you saw this truck when you were about one hundred fifty feet of it, as you were coming down the road toward it, and about one hundred fifty feet away, you

saw this truck, you say, coming into your lane of travel, didn't you?

A. He turned into my lane of travel.

Q. 55. He was about half way in your lane of travel when you saw him, was he not?

A. No, sir.

page 141 } Q. 56. Now, on page twenty-three of the record, I will read you from the record, and ask you if these questions were asked you and whether or not you made the answers thereto as indicated: Question: "And what did you do at that time, when you say you saw this truck up there with its left light blinking? Did you do anything to bring your speed under control?" Answer: "Well, sir, when I got over top of the hill there and seen the truck and seen he was on his side of the road and sitting there, I advanced on, on down the road." You advanced on?

A. Yes, sir.

Q. 57. Question: "He was sitting there?" Answer: "He was sitting there."

A. Yes, sir.

Q. 58. He was not moving, although this left light was blinking? So you do know the left light was blinking?

A. Yes, sir.

Q. 59. As you advanced on down the road it kept on. Now, you say you didn't state that when you began cutting down your speed he had gotten across in your lane of travel?

A. When I hit my brakes—When he turned to cross the white line on me I hit my brakes.

Q. 60. Well, he was across in your lane before you started breaking, was he not?

A. No, sir, he started across,—he was crossing the white line.

Q. 61. I read you from pages twenty-three and twenty-four of the record, and see if these questions and an-

page 142 } swers are correct. Question: "And you didn't start to cut down your speed until you were how close to him?" Answer: "I would judge that for about one hundred fifty feet when he turned across the road." Question: "One hundred fifty feet, and where was the truck at that time when you say you cut down your speed, began cutting down your speed, or trying to?" Answer: "He had got across into my lane of the road." Question: "Was he in your lane?" Answer: "Yes, sir."

A. He was—he was coming into my lane.

J. E. Honaker.

Q. 62. He crossed into your lane?

A. He was coming across, yes, sir,—how come me to apply my brakes, sir.

Q. 63. He was in your lane?

A. Yes, sir.

Q. 64. Question: "Or just crossing your lane?" Answer: "He was about half way in, coming right across." Question: "You mean the front of his truck was half way over in your lane at that time?" Answer: "Yes, sir, coming across?" Were those questions asked you?

A. That is why I was sliding. Yes, sir.

Q. 65. Did you make those answers to them?

A. Yes, sir.

Q. 66. And they were correct answers?

A. Yes, sir.

Q. 67. I believe your car was in contact with the truck on the left side of your car about the rear of the fender and at the door?

A. Left front fender, yes, sir.

page 143 } Q. 68. Left front fender?

A. Yes, sir.

Q. 69. And the truck's contact with the car was also on the left side of the truck?

A. I don't know, sir, only what I was told.

Q. 70. You don't know, then, about where the contact was with the truck?

A. No, sir.

Q. 71. Didn't you state in your examination yesterday that the left front fender of the truck hit the automobile? Didn't you state that on the witness stand on yesterday?

A. I was told the left side of the truck was tore up.

Q. 72. I am not asking you what was told you. I asked you if you stated before this jury yesterday that the left of the truck hit your automobile?

A. Yes, sir. When I hit this side went up over the road—sidewalk, my rear tire busted and wrapped me around the front of the truck, and the damage done to the truck I do not know.

Q. 73. You didn't say anything about the tire bursting when you testified about these facts before, did you?

By Mr. Gillespie: Objection. I think that the jury will remember that he stated that the tire bursted.

By the Court: Let him answer the question.

J. E. Honaker.

A. Yes, sir, I think I told you that yesterday.

Q. 74. I mean in the hearing preceding this trial—before this trial—did you say anything about the tire

page 144 } bursting?

A. I thought I had, sir.

Q. 75. Now, when you got somewhere within one hundred fifty feet from the truck I believe you said you were at the entrance that goes into the Richlands high school.

A. Somewhere near there I would say.

Q. 76. When you say that you saw this truck start across?

A. I say right here is the entrance to the Richlands high school.

Q. 77. Make a mark there where you say you were at that time. Make an "X" mark on this map. Where is the special map, the one the jury has? May we have it just a minute please. Now, I will get you to make an "X" mark on the map where you say that you were at the time that you first saw this truck start across?

A. I say somewhere in that neighborhood.

Q. 78. That is West of the entrance to the Richlands high school, is it not?

By Mr. Gillespie: Let the jury see where he put the mark.
By Judge Lively: All right.

A. This is to Richlands?

Q. 79. Yes.

A. I would say that would be West.

Q. 80. Were you West of that entrance, or did you see it by the time you got to the entrance?

A. I would say I was right about that entrance there; right along there, that lower side of the driveway that goes into Richlands high school.

page 145 } Q. 81. Now, where was it you claim that the Mundy truck was at that time? Put a "Y" where you claim the Mundy truck was?

A. When I first saw him turn across—Here is the lower end.

Q. 82. When you first saw him turn across?

A. He was approximately here.

Q. 83. Put a "Y" there.

A. Yes, sir,—turning into the lower side of this driveway that goes into the Texaco Service Station.

Q. 84. How far is it from where you claim that you saw the Mundy truck sitting to the North lane of the highway?

J. E. Honaker.

How far did he have to go to get into the North lane?

A. How far did he have to cross?

Q. 85. Yes.

A. He was sitting right at the white line on his side of the road. All he had to do was to start across.

Q. 86. By sitting at the white line, how close do you mean to the white line?

A. Right at the edge of it. He had got his left tire tilting to the side of the road.

Q. 87. And the front of the truck was further across?

A. He was sitting direct—straight—parallel with the line.

Q. 88. In other words, his truck had not tilted over to the North lane?

A. No, sir.

Q. 89. It was sitting straight?

A. Yes, sir, he was sitting facing me, sir.

page 146 } Q. 90. I believe you said that your front wheels were up on the sidewalk?

A. Yes, sir.

Q. 91. At the time of the collision?

A. No, sir.

Q. 92. They were not?

A. At the time of the collision. Yes, sir, they was. I had them on the right side—I had the front end up.

Q. 93. When you saw him, you admit he was over in your lane, or coming into your lane, what did you do?

A. I hit my brakes, sir.

Q. 94. And what did your car do?

A. My automobile slid.

Q. 95. What did your car do?

A. It started sliding.

Q. 96. In what shape was it when it started slipping?

A. I cut it to the right as far as I could and it went to sliding sideways.

Q. 97. How far did it slide sideways?

A. I don't know.

Q. 98. About how far?

A. I say one hundred forty feet or fifty feet at that time, at the time I hit my brakes.

Q. 99. From the time you hit your brakes this automobile slid sideways one hundred forty or fifty feet?

A. Not completely sideways. It was sliding on an angle.

page 147 } Q. 100. Tell us what sort of an angle it was sliding?

A. Sliding in on an angle, the right end was

working over to the left. I got it kind of straightened back when I was going in to the front of him. What I mean, going over the sidewalk I had cut it as far as I could to try to cut it back.

Q. 101. Where were your wheels during that sliding of one hundred forty or fifty feet?

A. They were sliding, sir.

Q. 102. The wheels were sliding too?

A. Yes, sir.

Q. 103. Were they turning or set?

A. They were sliding, sir.

Q. 104. You mean by that they were not turning?

A. No, sir, my brakes had locked.

Q. 105. So the car, when you put your brakes on, this distance which you estimate something like one hundred fifty feet, the car turned sideways and slid something like one hundred forty or one hundred fifty feet?

A. It didn't turn sideway, it started creeping on a angle.

Q. 106. Didn't you say it went sideways? Didn't you say that just now?

A. It started sliding.

Q. 107. And it went that way for one hundred forty or one hundred fifty feet?

A. Until I went up over the sidewalk.

Q. 108. It had plenty of power when it stopped sliding, didn't it?

A. I don't understand your question.

page 148 } Q. 109. It had a good deal of power in it when it hit the truck?

A. It was turned completely around, if that is what you mean—by the impact—yes, sir.

Q. 110. How is that?

A. The impact of the truck and me colliding there turned me clear *aound*, sir.

Q. 111. It didn't hit the truck until it got on the left-hand side of it, did it?

A. It wrapped right around the truck.

Q. 112. You struck the truck on the opposite side of the truck from what was next to you?

A. It wrapped right around the front of the truck.

Q. 113. Didn't it strike the truck on the opposite side of the truck from that which was facing you?

A. It wrapped around the front of the truck. I could not

tell you whether it hit on the right or left side. I know it wrapped around.

Q. 114. You say you don't know where this truck showed the contact to be?

A. I didn't go up to the truck. I was taken to the hospital.

Q. 115. Now, what did your car do after it struck the truck?

A. It turned a half spin—went around to the right, the rear end, and rolled back into the Piggly-Wiggly driveway.

Q. 116. It turned around to its right after it struck the truck?

A. It went around to the right; the back of the
page 149 } car went to the right in a half turn.

Q. 117. You know about it doing that?

A. Yes, sir.

Q. 118. Then where did it go?

A. It just rolled back into the Piggly-Wiggy drive-way.

Q. 119. It rolled back into the Piggly-Wiggly driveway?

A. Yes, sir.

Q. 120. You know that it struck the left-hand side of this truck, don't you?

By Mr. Gillespie: Objection. He has asked that question a number of times.

By the Court: The objection is sustained. He says he didn't know.

Q. 121. You do remember what your car did there, the actions it took and what occurred there, don't you?

A. Yes, sir.

Q. 122. You were there where you could see this truck and see your car?

A. I was taken out of the automobile, sir, and put into the ambulance.

Q. 123. I am talking about during this occurrence. You could see the truck and see the car?

A. Yes, sir.

Q. 124. And see their position?

A. Yes, sir.

Q. 125. And did do it?

A. Yes. I was wrapped right around the front
page 150 } of the truck.

Q. 126. You do know when your car came to a stop it was headed back toward Cedar Bluff?

A. It was, yes. sir. It turned a half turn into a half circle and was headed back.

J. E. Honaker.

Q. 127. And how far was it away from this truck?

A. To judge that, I don't know. I could not move. I could see the truck. I don't know, it may have been fifty or seventy-five feet, I don't know exactly.

Q. 128. Did your car slide on until it struck the Mundy truck or did it stop before it got to the Mundy truck?

A. I would say it was sliding when it went up over the sidewalk, and it was still yet sliding.

Q. 129. Still sliding?

A. Yes, sir,—never did stop sliding until the collision.

Q. 130. In your testimony before didn't you testify that this *truck* slid sideways until it got within ten feet of the Mundy truck and then you put the gas to it?

A. I tried to put the gas to it. Yes, sir, I believe you will find that there. I never could get it to take hold and stop sliding on me.

Q. 131. I believe you said, I am not sure, that you didn't cut down your speed any until you put on your brakes there when you say you were within one hundred fifty feet?

A. Until I seen the truck start across on me, yes, sir.

Q. 132. Now, in your testimony before, on page twenty-six, were you not asked these questions and make these answers:

page 151 } Question: "Did you slide the whole one hundred fifty feet there sideways until you got to this truck?" Answer: "No, sir. I released my brakes when I seen that I was going to hit the truck and cut it to the right just as far as I could, and gunned the car. I mean I gave it the gas." Question: "You gave the car gas and cut to the right and released your brakes?" Answer: Yes, sir." Question: About where were you when you did that? About how close to the truck of Mr. Mundy?" Answer: "I had approximately—I would say I was within ten feet of the truck."

A. Yes, sir, the car—I mean the *breaks* would not break loose on it, sir.

Q. 133. You said when you testified before that it slid one hundred forty feet or something like that. You mean it stopped sliding then, didn't you? Was that not the substance of your testimony before?

A. I don't believe it stopped sliding, sir.

Q. 134. But you did give those answers to the questions?

A. I tried to give it gas and it would not take hold.

Q. 135. You answered as I have read to you from the record?

A. Yes, sir.

J. E. Honaker.

Q. 136. Did you see any cars coming up behind the truck of Mundy?

A. Before he turned in front of me. Yes, sir.

Q. 137. Where were these cars?

A. They was coming up behind the truck—three *of* four of them scattered on that side of the road.

Q. 138. Behind?

A. Yes, sir, behind him.

Q. 139. How close was the closest of those cars page 152 } to the Mundy truck?

A. I would not—I would not swear to that. There was three or four cars.

Q. 140. How far behind the Mundy truck was the nearest car?

A. I could not say; I would not say, because—

Q. 141. You stated before "They were behind the truck on down the road"?

A. Yes, sir. I know there was three or four cars up through that distance. I would not swear to it.

Q. 142. You gave us an estimated distance of the nearest one to the Mundy truck was two hundred feet.

A. I don't remember that sir, if I did. I know there was three or four cars coming up behind him there.

Q. 143. I read you from pages twenty-six and twenty-seven of the record. See if I read your answers to the questions correctly. Question: "Now, you say you saw some cars coming behind Mr. Mundy's truck?" Answer: "Yes, sir." Question: "How many cars did you see?" Answer: "There was two or three coming on up here, coming East." Question: "I believe you say that they got over out of the road and stopped?" Answer: "They was getting over, yes, sir." Question: "They were over out of the South traffic lane?" Answer: "Yes, sir." Question: "Getting over on the shoulder of the road?" Answer: "Yes, sir." Question: "Where were these three cars?" Answer: "They were behind the truck on down the road." Question: "How far behind it?" Answer: "Oh, estimating, I would say two hundred feet back in behind the truck." Questions: "You mean the front one was two hundred feet from the page 153 } truck?" Answer: "Something like that."

A. Yes, sir.

Q. 144. Did you make those answers before?

A. Yes, I did. I forget the distance there on that.

Q. 145. About two hundred feet was the nearest car to the Mundy truck?

J. E. Honaker.

A. At that time I would say that, yes, sir.

Q. 146. I believe you also stated those cars and all of them were out of the South traffic lane?

A. Yes, sir, they had pulled over.

Q. 147. I am not asking you if they pulled over. Did you state they were out of the traffic lane, off the rock road?

A. They were pulling over to the right—getting over.

Q. 148. On page twenty-seven of the transcript of your evidence, I will ask you if you were asked these questions on the previous trial and made these answers:

By Mr. Gillespie: When was this? Give him the date of the trial.

By Judge Lively: The 25th of November, 1957.

Q. 149. Pages twenty-six and twenty-seven. Question: "How many cars did you see?" Answer: "There was two or three coming on up here, coming East." Question: "I believe you say that they got over out of the road and stopped?" Answer: "They was getting over, yes, sir." Question: "They were over out of the South traffic lane?" Answer: "Yes, sir." Did you make those answers?

A. Yes, sir.

page 154 } By Mr. Gillespie: It is the same questions and the same answers he just finished reading. I think that the Court, counsel and the jury are entitled to have all these questions at one time. There ought to be some limit to the number of times the witness be required to answer the same questions. We object to counsel for the defendants going over the same thing over and over again.

By Judge Lively: That objection is entirely an unwarranted one. I just asked this witness if he seen these cars coming up behind the Mundy truck, and were all out of the South traffic lane, all off the hard top, and he had not made any answer to that.

By the Court: You had read over there some portion twice is what counsel had reference to. Let's move on as quickly as we can. You are entitled to cross examine the witness. He is on cross examination. Go ahead.

Q. 150. Now, were you asked those questions and did you make those answers?

A. Yes, sir. They were pulling off the road.

J. E. Honaker.

Q. 151. Did you answer "They were over out of the South traffic lane?"

A. If I did I don't remember it. You have it there. I do know the cars, at this time, were pulling over at that time.

Q. 152. Do you know they were out of the South
page 155 } traffic lane?

A. They may not have been completely out.

Q. 153. That is what you said that they were over out of the South traffic lane?

A. That is what I said there, yes, sir.

Q. 154. So, at the time and before the time you reached the place of the accident the South traffic lane was completely clear, was it not?

A. The North side is clear, sir.

Q. 155. I am not talking about the North side. The South side is the side next to Wimpy Jones?

A. I could not tell you about that sir, because I was watching this truck.

Q. 156. There was not anything to have kept you from pulling to the South of the Mundy Truck, and you had a clear South traffic lane to go in?

A. I had no business over there, sir.

Q. 157. You didn't have any business over there?

A. No, sir.

Q. 158. Then, is your idea it was better to run into this car?

A. I didn't run into him. I was trying to dodge him.

Q. 159. There was some contact there between the cars?

A. Yes, sir.

Q. 160. And there was no reason why you could not have gone to the left of this car? You had a clear South traffic lane to go in?

A. No, sir, I would not try to go on that side. I don't think
my sense of direction would have told me to do
page 156 } that.

Q. 161. So far as any physical obstruction was concerned you could have done that?

A. I would not say that. My view was blocked with the truck by that time,—by the time he had turned across on me.

Q. 162. You could not see for the truck?

A. After he had took across there, no, sir.

Q. 163. You saw these cars?

A. Yes, before that turn.

Q. 164. Before he turned across?

A. Yes, sir.

J. E. Honaker.

Q. 165. You didn't expect them to turn back into the traffic lane, did you?

A. I didn't expect him to turn across on me, sir, until he did.

Q. 166. His lights were blinking for turning across, were they not? You knew what that meant?

A. Yes, sir, I knew what they meant.

Q. 167. You knew if you followed the signal his lights were giving—if he followed the signal his lights were giving, he would cross your traffic lane?

A. Not right in front of me.

Q. 168. You did know he had cut even then, didn't you?

A. No, sir.

Q. 169. Let's see, on pages twenty-two and twenty-three, I read from the record of your testimony in the former trial.

page 157 } Question: "You also saw the left blinker on this truck was on?" Answer: "Yes, sir." Question: "Giving a signal?" Answer: "Yes, sir." Question: "What did that mean?" Answer: "That meant he was going to turn in left, a left turn." Question: "That meant he was turning left which would have been across your lane of travel?" Answer: "Yes, sir."

A. That is right, yes, sir. I didn't know he was going to turn across there in front of me.

Q. 170. You knew that was what his signal meant, didn't you?

A. Yes, sir.

By Mr. Gillespie: We would like to know the purpose of reading these questions and answers. Certainly if it is for contradiction it is exactly like the testimony here today. We still would like to insist that there be some limit to the questions on the same proposition in this cross examination.

By the Court: The witness is on cross examination. Go ahead.

Q. 171. I believe you stated yesterday that this car belonged to you personally?

A. Yes, sir, it was my car.

Q. 172. Your car?

A. Yes, sir.

Q. 173. I believe you also stated that you were employed by the Pocahontas Fuel Company?

A. Yes, sir.

Q. 174. Are you yet?

J. E. Honaker.

A. Yes, sir.

Q. 175. Yet with them?

page 158 } A. Yes, sir.

Q. 176. And have been ever since?

A. Yes, sir.

Q. 177. And you have been paid your salary by this company?

A. Yes, sir.

Q. 178. That is your salary that is paid you in this county is for acting as part time officer over there?

A. Yes, sir.

Q. 179. That is the only work you do for them?

A. No, sir. I drove the ambulance, I haul the time cards and mail to and from Pocahontas and do a lot of their errands.

Q. 180. The only pay you get for this part time deputy sheriff work you say you are engaged in was from the Pocahontas Fuel Company?

A. Yes, sir.

By the Court: Is that all, gentlemen?

By Judge Lively: I want to ask one further question.

Q. 181. You say when you first saw this truck you could not tell whether it was moving or standing still?

A. When I first topped the hill.

Q. 182. When you first topped the hill you could not tell whether it was moving or standing still?

A. That is right.

Q. 183. You did, at that same time, see this left signal light blinking though?

A. Yes, sir.

page 159 } Q. 184. And you didn't cut down your speed at that time, but on the other hand increased it?

A. At that time I could have stopped if he had went across the road in front of me.

Q. 185. That is not the question I asked you. At the time you saw this car coming with this left blinker light on, you could not tell whether it was moving or standing still?

A. That is correct.

Q. 186. You didn't cut down your speed but you increased it?

A. That is right, sir.

Q. 187. I believe you have stated that you went to the hospital the same day this occurred?

A. Yes, sir. I was taken to the hospital.

J. E. Honaker.

Q. 188. Did Mr. Mundy talk with you before you went to the hospital?

A. Not as I know of, sir.

Q. 189. Did he talk with you after you went to the hospital?

A. I don't remember it, sir, if he did.

Q. 190. Did you introduce him to your wife?

A. That might have been about two weeks or something like that after that, somewhere in that neighborhood.

Q. 191. Did you talk to Mrs. Patton, the superintendent of nurses down there a day or two after the accident, possibly the next day?

A. The only time I remember of talking to Mrs. Patton was after I was up able to go around, and I saw her in the central supply office down on B floor and we was page 160 } talking about the accident, and I don't recall only one thing or two things that Mrs. Patton said. She said that she knew Mr. Mundy, knew his family, that they lived near her and that he was awfully wild and reckless and he was worrying his mother to death by wrecking cars. Did you know he wrecked one last week? I said I didn't know a thing about that. That is all I remember talking to Mrs. Patton.

Q. 192. The question I asked was whether or not you talked to Mrs. Patton the next day or the following day after the accident took place?

A. No, sir, I was doped and unconscious. I would not say I did, sir.

Q. 193. Did you tell Mrs. Patton, at that time, that you had talked to Mr. Mundy about this the day before?

A. I don't remember talking to her at that time.

Q. 194. Did you talk with Mr. Rasnick and Mr. Mundy on the same day this accident occurred?

A. I was told they was there. I don't remember it, sir.

Q. 195. At that time, the same afternoon of this accident, did you talk to Mr. N. C. Rasnick and Mr. Mundy here, and tell them that you were in bad shape but everything will be all right and told them you had called your wife, and Mundy asked you if he could do anything for you and you told him no. Did anything like that occur?

A. I don't remember that, sir. I do remember the Doctor having the nurse give me a shot.

Q. 196. Do you remember Mr. Mundy saying to you at that time he was sorry, and you said to Mr. Mundy, page 161 } don't let it worry you, it was one of those things, it was not your fault, I should not have been driving the way I was?

C. H. Gallimore.

A. I don't remember that, sir.

Q. 197. Did you tell Mrs. Patton, during this conversation I have just asked you about, that you didn't know whose fault the accident was?

A. I don't remember telling Mrs. Patton that.

Q. 198. And you didn't tell her that you had talked to Mundy?

A. I don't remember it if I did, sir.

RE-DIRECT EXAMINATION.

By Mr. Proffit:

Q. 1. When you saw the Mundy truck stopped there in the left traffic lane and with the blinker light on, what did you think he had stopped for?

A. To let me pass.

By Judge Lively: That is objected to because immaterial.

Which objection the Court overruled to which ruling the defendants, by *counse,* at the time excepted.

Q. 2. And your answer was?

A. To let me pass, sir.

* * * * *

C. H. GALLIMORE,

another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

page 162 } By Mr. Gillespie:

Q. 1. You are Trooper C. H. Gallimore?

A. Yes, sir.

Q. 2. Where do you live?

A. Marion, Virginia.

Q. 3. I believe you are a member of the State Police Force?

A. Yes, sir.

Q. 4. How long have you been a member of the State Police Force?

A. Approximately four years, sir.

C. H. Gallimore.

Q. 20. Tell the jury what part of the truck was damaged.

A. The left front fender, the hood and left side
page 164 } of the truck was damaged.

Q. 21. The left front fender and hood?

A. Yes, sir.

Q. 22. Any damage done to the bumper?

A. Correction on that. It was the right front fender and hood that was damaged.

Q. 23. Are you sure about that?

A. Yes, sir.

Q. 24. The right front fender and hood?

A. That is correct.

Q. 25. Now, was there any glass or dirt or other debris on the road or driveway, or area in the vicinity of where this truck was sitting when you got there?

A. Yes, sir, there was.

Q. 6. Tell the jury where you found that glass and debris?

A. It was in the Western half of the driveway and the highway, just about in the center of that half of the intersection.

By Judge Lively: What did you say. Let the reporter read it over for you.

Thereupon the answer "It was in the Western half of the driveway and the highway, just about in the center of that half of the intersection." was read by the reporter as reported.

Q. 27. I hand you what has been introduced in evidence and identified as Plaintiff's Exhibit No. 1, which is a map

purporting to show the highway at that point
page 165 } and which also shows driveways and different

business establishments, as well as the high school on the North side of the highway, and will ask you to examine that map, and after examining it, can you tell us which driveway entrance you referred to as being the place where you found the glass and debris?

A. Yes, sir. This one right here.

Q. 28. Turn the map around here and point it out to the jury.

A. This one right here, this driveway.

Q. 29. And would you put the letter "A" at approximately as near as you can locate it on this map, where you

C. H. Gallimore.

Q. 5. Where were you stationed on September 2, 1956, Trooper Gallimore?

A. Richlands, Virginia.

Q. 6. Were you called upon to investigate a traffic accident which occurred just West of the new Richlands high school on that day, shortly afternoon?

A. Yes, sir.

Q. 7. Did you go to the scene of that accident and make an investigation?

A. Yes, sir, I did.

Q. 8. Did you find out, after you got there, what vehicles had been involved in the accident?

A. Yes, I did.

Q. 9. Tell the jury what those vehicles were, what kind they were?

page 163 } A. A 1956 GMC two ton truck and a 1956 Pontiac sedan were involved.

Q. 10. Had either one of those vehicles been moved when you got there?

A. No, sir, they had not.

Q. 11. Did you learn who was operating the Pontiac?

A. Yes, I did.

Q. 12. Who?

A. Mr. James Elijah Honaker.

Q. 13. Did you learn who had been operating the GMC truck?

A. Yes, sir.

Q. 14. Who?

A. Charley David Mundy.

Q. 15. Is that the same Charles Mundy who sits over there?

A. Yes, sir, it is.

Q. 16. Tell the jury what the position of the truck was when you got there?

A. The truck was sitting at an angle across the road headed in a Northeasterly direction.

Q. 17. And over what portion of the road or what traffic lanes was the truck occupying?

A. It was occupying the West bound traffic lane, sir.

Q. 18. That would be the traffic lane leading to Richlands?

A. That is correct.

Q. 19. Could you tell what part of the truck was damaged, if any of it was damaged?

A. Yes, sir.

C. H. Gallimore.

A. The skid marks I could only determine on
page 167 } the highway. I don't know whether they were on
the gravel portion or not.

Q. 44. After the car left the highway, across the sidewalk and driveway into this parking area?

By Judge Lively: Objection. Let the witness state that.

Which objection the Court overruled, to which ruling the defendants, by counsel, at the time excepted.

By The Court: Go ahead and answer.

Thereupon the foregoing question was read by the reporter as reported.

Q. 45. Were there any skid marks from that point on?

A. I could not determine. The gravel was torn up. The best I remember the skid marks were on the highway, going in the vicinity of the front of the truck.

Q. 46. What kind of surface was there in this particular area of the Piggly-Wiggly?

A. Gravel.

Q. 47. Loose gravel?

A. Yes, sir.

Q. 48. What was the position of Mr. Honaker's car?

A. It was headed East. It was headed in this direction on the map.

Q. 49. Back toward Cedar Bluff?

A. That is correct.

Q. 50. What portion of the automobile was damaged?

A. The left side of the Pontiac and the windshield were damaged considerably.

Q. 51. Was the front of that car damaged?—Show any evidence of having been in contact with anything else at
all?
page 168 } A. I don't remember, sir.

Q. 52. But you do remember the left side?

A. Yes, sir.

Q. 53. Did you make notes at the time as to what damages you observed?

A. Yes, sir, I did.

Q. 54. Do your notes show any damage to the front of the car?

A. No, sir.

found this glass and debris on the surface of the road or driveway?

A. I will.

Q. 30. Now, Mr. Gallimore, did you see any skid marks upon the highway near where this debris and glass was, or where the truck was sitting, when you got there?

A. Yes, sir, there was some skid marks there.

Q. 31. Tell the jury where those skid marks were and describe them and their length and location in the highway, if you have that information?

A. The skid marks were headed or were angling toward the direction of the truck, and they pointed in a Northwesterly direction. They were in an angle.

Q. 32. Now, just take this map again, if you will, and try to describe to the jury just about the angle and location of these skid marks.

A. The skid marks, generally, were in this direction.

Q. 33. And you say they were at an angle?

page 166 } A. Yes, sir, they were.

Q. 34. Where did they begin?

A. I don't know, sir.

Q. 35. Were they in the West bound traffic lane or the East bound?

A. They were in the West bound.

Q. 36. Do you know about how long they were?

A. I did measure the length of the skid marks, from the time the skid marks started until the car came to a complete stop.

Q. 37. What was that distance?

A. Sixty-three paces.

Q. 38. And about what is the length of your pace?

A. Approximately thirty inches.

Q. 39. And you say that was from where the skid marks began until where the car was sitting when you got there?

A. That is correct.

Q. 40. Did you measure the distance from the truck to the car?

A. No, sir, I didn't measure it.

Q. 41. Can you give to the jury any estimate as to what that distance was?

A. The car was approximately fifty feet from the truck.

Q. 42. Approximately fifty feet from the truck.

A. Yes, sir.

Q. 43. Did these skid marks extend from where the car was sitting, back up to the East for sixty-three paces?

C. H. Gallimore.

A. The right front fender and side. Not specifically, generally is all I can say.

Q. 2. Is there anything in your notes to indicate which portion of the truck was damaged in the collision? Will you refer—

A. Yes, I will. My notes reflect the left. I was facing the truck at the time I made them.

Q. 3. Your notes were made at the time of your investigation?

A. Yes, sir.

Q. 4. While the truck was still there?

page 170 } A. Yes, sir.

Q. 5. And before the vehicles had been moved?

A. Yes, sir.

Q. 6. And they were made by you?

A. That is correct.

Q. 7. As an officer in the State Police Force?

A. Yes, sir.

Q. 8. In your official capacity and during your investigation of that accident?

A. Yes, sir.

Q. 9. And your notes, so made, reveal it was the left front of the truck that was injured?

A. My notes reveal that, yes, sir.

* * * * *

Outside the hearing of the jury.

* * * * *

page 172 }

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By Mr. Shufflebarger: The defendants, by counsel, move the Court to strike out the evidence as to both defendants for three specific reasons.

1. That the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the defendant, Charles Mundy is guilty of negligence which proximately caused the accident. We feel that there has been a total lack of any evidence showing any negligence on the part of Charles Mundy.

Q. 55. They do show damage to the left side?

By Judge Lively: That is objected to.

Which objection the Court overruled, to which ruling of the Court the defendants, by counsel, at the time excepted.

A. Yes, sir.
Q. 56. Mr. Gallimore, what was the speed limit at the place where this accident occurred?
A. Fifty-five miles. Fifty-five miles an hour.
Q. 57. What kind of a day was it?
A. It was clear.

By Judge Lively: Objection to that question—What was the speed limit.
By the Court: If the witness knows, he can so state.
By Judge Lively: The Statute does not fix the speed limit.

By The Court:
Q. 58. What is the posted speed limit?
A. Fifty-five miles. Fifty-five miles an hour.

page 169 } By Mr. Gillespie:
Q. 59. What kind of a day was it?
A. It was a clear day, sir.
Q. 60. And dry?
A. That is correct.
Q. 61. And you say your paces are about thirty inches?
A. Yes, sir.
Q. 62. And you stepped off sixty-three paces from where the skid marks began to where the car came to rest?
A. That is correct.

CROSS EXAMINATION.

By Mr. Shufflebarger:
Q. 1. During your direct examination by Mr. Gillespie you first testified that the left front of the truck was damaged and later changed that to the right side of the truck. After reflecting upon that, can you state to the jury specifically which portion of that truck was damaged in the impact with the Honaker car?

2. Even if there were evidence of negligence on the part of Charles Mundy, there is also explicit and direct evidence of contributory negligence on the part of the plaintiff, J. E. Honaker. In the first place, with reference to that point, under Honaker's own statement as to the speed
page 173 } of his car, he is guilty of negligence *per se,* because he is guilty of violating the Statute. He stated he was driving between fifty-five and sixty miles an hour. The maximum speed limit there was fifty-five miles an hour, hence he is, as a matter of law, guilty of negligence.

He admits that when he came over the crest of the hill that he observed the truck being operated by the defendant, Charles Mundy, giving a signal indicating to him, Honaker, that the truck was preparing to make a left hand turn.

The statute in Virginia provides that when a signal to stop, start or go is given by the driver of a vehicle and is seen or should be seen by the driver of another car, then it becomes the duty of the driver of that other car to bring his car under control.

Section 36-246 of the Code provides: Drivers receiving a signal from another driver shall keep their vehicle under complete control, and shall be able to avoid an accident resulting from a misunderstanding of such signal.

There is, under the plaintiff's own testimony evidence that he observed the signal of Mundy, he understood it, but he failed to keep his vehicle under control, and failed to be able to avoid an accident, hence he was guilty of a
page 174 } second breach of a statutory duty, and also guilty of negligence *per se.*

I don't think it is necessary to repeat Mr. Honaker's testimony, but he states that after he saw this signal light indicating a left hand turn, that instead of bringing his vehicle under control and instead of avoiding the accident he increased the speed.

They are two distinct violations of the Statute, being specific acts of negligence on the part of the driver of the Honaker car.

He is guilty of negligence *per se,* hence the contributory negligence, and by reason thereof, any verdict the jury would find would be subject to be set aside because of that.

3. Our third point is upon the defendant, Hayes Richlands Metal Products Corporation filing its affidavit, denying Mundy was an agent, servant or employee at the time of the accident and denying ownership of the truck. The burden was upon the plaintiff to prove, by a preponderance of the evidence, Mundy was, in fact, an agent of the defendant Hayes Richlands Metal Products Corporation.

We feel the evidence is completely void as to proof of agency. While he was an agent and employee of Hayes Richlands Metal Products Corporation up until
page 175 } 12:00 o'clock noon that day, then he stopped being such agent, employee or servant, and was either operating the truck on his own responsibility or as agent of the owner of the truck, Macil McGlothlin.

By Mr. Gillespie: Now, if the Court please, as to the third ground, we think that the evidence is certainly sufficient to go to the jury on the question of agency of Mundy.

He testified that he was the employee of Hayes Richlands Metal Products on the occasion of this accident, and that as an incident to and as part of the main purpose of this truck being delivered to him as the agent of Hayes Richlands Metal Products, he undertook to say that that truck was to be delivered to the C. & S. Texaco Service Station for servicing, and it was while he was acting in such capacity that the accident occurred.

As to the motion to strike the evidence as to both defendants for the reason that the evidence fails to show negligence on the part of the defendant, Charles Mundy, and that the evidence shows that the plaintiff was guilty of contributory negligence, we would say this:

The evidence clearly shows that Mundy, the driver of this truck, had an unobstructed view for at least
page 176 } five hundred fifty feet. The law requires him to keep a reasonable lookout, and if he had been keeping a reasonable lookout it would have revealed this Pontiac automobile proceeding toward him from the opposite direction at a speed of fifty to sixty miles an hour.

In spite of the fact that this automobile was approaching him in that manner, he, without any regard for the safety of others using that highway, or for his own safety, waited until that car had gotten in approximately one hundred fifty feet from him, when he abruptly pulled that truck from its stopped position, in its own proper traffic lane, across the West bound traffic lane, blocking that lane. And it does not make any difference whether the speed of the car—plaintiff's car—at that time had been forty miles an hour or sixty miles an hour, the result would have been the same. And while it may be true, under the law, that traveling at fifty-five to sixty miles an hour is in violation of the Statute, but there is one very important element which the distinguished gentlemen for the *defenants* have failed to take into consideration in this case, and that is proximate cause.

The sole proximate cause of this accident was the negligence of the defendant, Charles Mundy in pulling that truck

across the highway, which the plaintiff had a right
page 177 } to expect would remain open until he had safely
passed.

The Supreme Court of Appeals, in a recent case, has stated that, in a similar case, the fact that the defendant claimed that the plaintiff was proceeding toward him from the opposite direction at an unusual high rate of speed, should have put the defendant on an additional degree of care in order to have stayed on his side of the road until this speeding automobile, approaching from the opposite direction, had passed by in safety and avoided an accident, and held when he failed to stay on his own side of the road, in face of such approaching, speeding automobile, that he was guilty of such negligence as was the sole proximate cause of the accident, and a verdict and judgment for the plaintiff in that case was sustained.

By Judge Lively: What is the case?

By Mr. Gillespie: I have shown it in the brief filed in the other case.

By Judge Lively: We would like to know what the case is.

By Mr. Gillespie: It is in the past ten years, and it is exactly the same case as to these grounds you raised as was cited in that brief. You have a copy of it.

page 178 } By Mr. Shufflebarger: In reply to the argument of counsel for the plaintiff, I would like to call the Court's attention to the fact, under the Statute requiring the giving of signals before starting or stopping or going from a direct line, that our Supreme Court has held that that does not make the driver—in this case Mundy—an insurer, but the law only requires him to use reasonable care to see a turn could be made in safety.

Furthermore, the Statute, is Section 46-235 provides:—I will read—Drivers having once given a hand, electric or mechanical device signal, must continue the course indicated unless they alter the original signal to take care—

By the Court: That means when he gave a left hand signal he wanted to turn to the right, etc.

By Mr. Shufflebarger: If he gives a left hand signal, indicating a left turn, he is supposed to turn to the left.

By the Court: He is not supposed to make that turn in the face of oncoming traffic. I think that would be a jury question. Honaker said he had his car under control until the truck popped out in front of him one hundred fifty feet
away.

page 179 } By Mr. Shufflebarger: I refer the Court to
the Statute giving the starting and stopping conditions.

Under Honaker's own testimony if he were only driving sixty miles an hour he would travel eighty-eight feet per second and be able to stop his car in two hundred fifty-one feet.

By Mr. Gillespie: That still would not permit him to stop in one hundred fifty feet.

By Mr. Shufflebarger: He saw this signal and it continued to blink.

By Mr. Gillespie: He had a right to assume that that man would stay there on the side of the highway.

By the Court: We will have to leave that for argument before the jury.

I think, at this point, I will overrule the motion to strike. I think the record, so far, shows negligence on the part of the driver Mundy. I think there is evidence of agency. So far as the contributory negligence is concerned, that is a pretty close question, and that is what is troubling me.

I think, at this point, I will overrule the motion to strike.

By Mr. Shufflebarger: We desire to note an
page 180 } exception to the Court's ruling.

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HERBERT JOHNSON, JR.,
a witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Judge Lively:

Q. 1. What is your name?

A. Herbert Johnson, Jr.

Q. 2. Where do you live and what do you do?

A. I live in Richlands, and I am shop superintendent for Hayes Richlands Metal Products at Richlands, Virginia.

Q. 3. How long have you been with Hayes Richlands Metal Products as shop superintendent?

A. Oh, about two and a half years, something like that.

Q. 4. Were you holding that position on September 2, 1956?

A. I was.

Herbert Johnson, Jr.

Q. 5. Do you know anything about a man by the name of Macil McGlothlin bringing a truck to the Hayes Richlands Metal Products' place of business for some work to do done on it?

A. I do.

Q. 6. What do you know about that?

A. Well, I don't remember the exact date, but seems like it was on a Friday that Mr. McGlothlin called me and wanted an extension put on his truck bed.

Q. 7. Now, assuming that this accident happened on Sunday, September 2, 1956, your recollection is that
page 183 } it was on Friday before that this Mr. McGlothlin called you?

A. He called on Friday, yes, sir, and wanted to bring the truck in on Saturday morning.

Q. 8. Did he mention any other work to be done to the truck except the extension to the bed?

A. No, sir.

Q. 9. And what did the extension on the bed consist of? What did you do?

A. We had to cut the body in two on the back end, I believe it was to put a foot extension on it, and put the body back together.

Q. 10. Was that all you were to do under your contract and agreement with Mr. McGlothlin?

A. Yes, sir.

Q. 11. What did you do? What did you tell Mr. McGlothlin about doing this work?

A. Well, it was so late on Friday afternoon, we don't usually work on Saturday, I believe Mr. Mundy was still at the shop, and I told him if he could get Mundy to do that job on Saturday for him it would be all right with me.

Q. 12. What Mundy do you refer to?

A. Charles Mundy.

Q. 13. This gentlemen here?

A. Yes, sir.

Q. 14. What position did Mr. Mundy occupy?

A. He was the installation foreman.

Q. 15. And what are the duties of an installation foreman?

A. To install bodies and hoists on motor trucks.

Q. 16. And did you see Mr. Mundy and see if
page 184 } he would do this work?

A. Yes, sir, I did.

Q. 17. Did he agree to do it?

A. Yes, sir.

Herbert Johnson, Jr.

Q. 18. What was to be done with this truck after the installation that you have spoken of?

A. So far as I knew at the time Mr. McGlothlin would be there and pick it up, as he had done previously to that job.

Q. 19. Had he been accustomed to bringing work to your shop and having work done there? Was he your customer?

A. Yes, sir.

Q. 20. What had been his custom about getting the vehicles after it was repaired?

A. Well, as a rule I would say he was there most of the time seeing the job performed, and he would take it himself.

Q. 21. Did you ever, at any time, move a truck for Mr. McGlothlin, or a vehicle, to any place for him?

A. No, sir.

Q. 22. Did you have any understanding or agreement, express or implied, with Mr. McGlothlin that you were to move this truck or take it any place away from your place of business?

A. No, sir.

Q. 23. Did the company have a policy about the delivery of trucks? Or about not delivering trucks or vehicles that were brought there?

A. Well, now, you have got me tied up there a
page 185 } little bit. Occasionally we have picked trucks up
from the dealer, the truck dealer, and bring them to the shop and install the bodies and hoists and take them back to the dealer.

Q. 24. That applied to new trucks?

A. Yes, sir.

Q. 25. Now, did you ever, at any time, deliver trucks for other people from your place of business, and, if so, what was the proceedure that was followed and required by its policy?

A. Well, I don't think I ever had to deliver a job for any one except a dealer.

Q. 26. And what was the policy that you followed in delivering to the dealers? Did any of the men have authority to take trucks back, or did they have to get your authority?

A. No, sir. Before the job was brought into the shop the dealer would call me, and he would make arrangements through myself and the dealer, and I would go in the shop and pick out an individual and send him to get the truck, and when the job was finished I would pick out an individual to take it back.

Herbert Johnson, Jr.

Q. 27. Did any of these men, including Mr. Mundy, have authority to deliver trucks or motor vehicles of any kind and work on them without authority from you?

A. No, sir.

Q. 28. Express authority?

A. No, sir. That was one of the policies of the company, that any moves that were made that it was my position to take care of it, and it still is now.

page 186 } Q. 29. In other words, you don't permit any of the employees to deliver trucks?

A. No, sir.

Q. 30. Except upon express authority from you?

A. Right.

Q. 31. And that was the policy of the company in September, 1956?

A. Yes, sir.

Q. 32. And prior to that time. Did you ever give Mr. Mundy or any one else connected with your company any authority to deliver Mr. McGlothlin's truck to any point away from your place of business, the place of business of Hayes Richlands Metal Products Company?

A. No, sir.

Q. 33. I believe you said that you talked to Mr. McGlothlin, according to your recollection, on Friday before this truck was brought in. When was it brought in, if you know?

A. It was brought in on a Saturday morning.

Q. 34. Were you there at that time?

A. Yes, sir.

Q. 35. Did you see Mr. McGlothlin and talk to him about this job at that time?

A. I did.

Q. 36. Did he make any request to you to deliver this truck to any place, or have it delivered to any place?

A. No, sir, it was not mentioned.

CROSS EXAMINATION.

page 187 } By Mr. Gillespie:

Q. 1. Mr. Johnson, you say you were superintendent of Hayes Richlands Metal Products Company?

A. Yes, sir.

Q. 2. You didn't ordinarily work on Saturday afternoon and Sunday, did you?

Herbert Johnson, Jr.

A. No, sir.

Q. 3. And Mr. McGlothlin wanted some work done on his truck and called you on the telephone about it on Friday?

A. Yes, sir.

Q. 4. And you told him if he could get Charles Mundy to agree to do the work for him over the week-end it would be all right with you?

A. No, sir, I told him if I could get Charley Mundy to do the work for him on Saturday.

Q. 5. It would be all right?

A. That it was all right with me.

Q. You went to see Charley Mundy and asked him if he would be willing to do some work on this truck?

A. I did.

Q. 7. And he said he would?

A. Yes, sir.

Q. 8. And then on Saturday Mr. McGlothlin brought the truck in?

A. Yes, sir.

Q. 9. And he talked to you and to Charley Mundy about fixing the truck?

A. Yes, sir.

page 188 } Q. 10. And said he wanted an extension put on the bed?

A. Right.

Q. 11. And Charley Mundy said he would do it?

A. Yes, sir.

Q. 12. And you said it would be all right with you if he wanted to work Saturday afternoon?

A. That was Saturday morning—Saturday morning. Yes, sir.

Q. 13. The truck was left there?

A. Right.

Q. 14. And at noon you quit and went home?

A. Right.

Q. 15. And the only person left there was Charley Mundy?

A. Right.

Q. 16. He was left there in control of the place and of this truck?

A. No, I would not say he was in control of the place of business.

Q. 17. He was the only person there?

A. In the shop, yes, sir.

B. P. BOGARDUS,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Judge Lively:

Q. 1. What is your name?

A. B. P. Bogardus.

Q. 2. Where do you live?

A. Pikeville, Kentucky.

Q. 3. And what do you do? What is your profession?

A. Right now I am an engineer.

Q. 4. What connection, if any, do you have with the Hayes Richlands Metal Products Corporation, which is located at Richlands, Virginia?

A. I am Secretary-Treasurer of the corporation.

Q. 5. Who has the management of this Hayes Richlands Metal Products Corporation and who did have it in September, 1956?

A. I did at that time.

Q. 6. I believe that the work of that concern is largely, if not entirely, making changes in the bodies of motor vehicles, trucks and so on, is that correct?

page 191 } A. Manufacturing and repairing—changing.

Q. 7. What kind of motor vehicles?

A. Trucks and truck beds—truck bodies.

Q. 8. Did the company have a policy at that time as to the delivery of vehicles which had been worked on there in its place of business?

A. The general policy was that dealers brought their trucks to the shop and took them back to their places of business themselves.

Q. 9. That was the general practice?

A. Yes, sir.

Q. 10. Did you have any policy varying from that practice? Did you some times have trucks or motor vehicles brought to the shop or taken away from the shop?

A. We had a few dealers who always asked for that little something extra. They would ask us to come and get a truck, now and then, when they didn't have a man available to bring it to us. On special occasions we have gone and picked up and delivered trucks to the dealers.

Q. 11. Was Macil McGlothlin what you would call a dealer?

Herbert Johnson, Jr.

Q. 18. Who else had control and custody of the truck, if he didn't?

A. He had custody of the place, that is enough, he didn't have control of it.

Q. 19. Was any body else there except him? Any body in control over him?

A. No, sir.

Q. He was there alone?

page 189 } A. Right.

Q. 21. Do you know whether or not that afternoon Mr. McGlothlin came back to see if he was going to get the truck finished that afternoon?

A. No, sir.

Q. 22. You were not there any more that afternoon?

A. That is right.

Q. 23. You don't know whether Mr. McGlothlin came back that afternoon and Mundy told him he would not be able to finish that day—would not get through until Sunday, and that they agreed that when he got through on Sunday he was to take the truck to the C. & S. Service Station for servicing because you were not there?

A. That is right. I was not there.

Q. 24. You had, on other occasions, had some body employed by your company to pick up work and deliver work, had you not?

A. Yes, of a different type.

Q. 25. And on occasions you had designated Charles Mundy to do this?

A. Uh, I am not sure but I don't believe that Charles Mundy had went out and picked up vehicles,—I am not positive.

Q. 26. When some body would want a truck picked up or delivered after work was done on it, you would designate one of your employees to do it?

A. Yes, sir.

Q. 27. That was all there was to it?

A. Yes, sir.

Q. 28. Whether you had ever designated

page 190 } Charles Mundy to do any of this some of the other boys that worked there had, and Charles Mundy knew that had been done?

A. More than likely he did. He had been there long enough.

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agent or servant of the company, have any authority to deliver such truck to McGlothlin?

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page 195 }

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A. If I remember the question properly, I guess the answer is no to it.

CROSS EXAMINATION.

By Mr. Gillespie:

Q. 1. Where do you live?

A. Pikeville, Kentucky.

Q. 2. Where did you live September 2, 1956?

A. I lived in Richlands five years and have been in Pikeville two years.

Q. 3. Were you there on September 1st when Mr. McGlothlin brought his truck there?

A. Was that Saturday?

Q. 4. Yes.

A. No.

Q. 5. Mr. Johnson was your shop superintendent, was he not?

A. That is right.

Q. 6. And was he next in command?

A. That is right.

Q. 7. Were you not general manager of the company and all of its plants?

A. No, sir. I was just general manager in Richlands.

Q. 8. Just general manager in Richlands?

A. This is the only plant that Hayes Richlands Metal Products had.

page 196 } Q. 9. Didn't you have any at Pikeville?

A. No, sir. There are no other plants.

Q. 10. You do know that not only dealers but customers had sought and obtained authority from Mr. Johnson to have one of the company employees pick up and deliver vehicles?

A. I don't think that is right.

Q. 11. Mr. Johnson is mistaken about that?

A. No, sir. Mr. Johnson didn't state that either.

B. P. Bogardus.

A. No, Macil McGlothlin, to my knowledge, was not a truck dealer. He is a coal hauler.

Q. 12. Did you have any policy with reference to the delivery of motor vehicles that had been worked on there for person other than a dealer?

A. No, sir.

Q. 13. You knew Mr. Mundy?

A. Yes, I knew Mr. Mundy.

page 192 } Q. 14. You knew his duties and authority at the time that this accident occurred on September 2, 1956?

A. Yes, sir.

Q. 15. I will get you to state whether or not Mr. Mundy, at that time, had either express or implied authority—

By Mr. Gillespie: If your Honor please, we object to this question because we think this witness was not even in this county at the time this occurrence took place.

By the Court: You may cross examine the witness. I think, as far as he can go whether or not he had express authority.

By Judge Lively: If the Court thinks the question of implied authority. This is a question of fact whether he had express authority?

A. No.

Q. 16. You mean Mr. Mundy had no express authority to deliver this truck to Mr. McGlothlin?

A. No, sir.

Q. 17. Or for Mr. McGlothlin?

A. No, sir.

Q. 18. Did you have any course of dealings with Mr. McGlothlin, or any other customers, whereby your employees had authority or were empowered to deliver trucks for the company while in the employ or working for the company for customers or patrons of the company?

A. No.

page 193 } Q. 19. Assuming, Mr. Bogardus, that Mr. McGlothlin, who was an occasional customer of your company, brought a truck there which Mr. Mundy had agreed to work on on Saturday and Sunday by extending the bed, and that was all the contract between the company and McGlothlin covered or required, would or did Mr. Mundy, as

A. I think that is correct.

Q. 23. You made that answer to that question despite the fact you were not at Richlands and didn't know
page 198 } that Mr. McGlothlin brought his truck there for any work?

A. I think that is right.

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CHARLES D. MUNDY,
one of the defendants, a witness introduced on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Shufflebarger:

Q. 1. What is your name, sir?

A. Charles D. Mundy.

Q. 2. You are one of the defendants in this proceeding?

A. I am.

Q. 3. How old are you?

A. Twenty-eight.

Q. 4. Where do you live?

A. Richlands. No, Cedar Bluff.

Q. 5. Mr. Mundy, were you employed by the Hayes Richlands Metal Products on September 1, 1956?

A. Yes, sir.

Q. 6. In what capacity were you employed?

A. Installation foreman.

Q. 7. What were the duties of an installation foreman?

A. The mechanical side of installing hoists and truck bodies.

Q. 8. Installing them on what?

A. On trucks.

Q. 9. And as foreman what part of that pro-
page 199 } cedure did you have?

A. I was to see it was done right and to help do it.

Q. 10. Who was the superintendent of the plant at that time?

A. Mr. Johnson.

Q. 11. Was he your immediate supervisor?

A. Yes, sir.

Q. 12. Is that Herbert F. Johnson, who has testified here this morning?

B. P. Bogardus.

Q. 12. Didn't you hear him testify that?

A. No. Possibly as to dealers, not as to customers.

Q. 13. Were you not sitting right over there and heard Mr. Johnson testify?

A. Certainly.

Q. 14. That when a customer wanted to have a vehicle picked up or delivered—

A. Mr. Gillespie, he said dealers. He didn't say customers.

Q. 15. Wait until I get through asking the question. That customers would ask him to let their employees pick up trucks and deliver them, and he would designate one of the employees to do that?

A. I can't answer that unless the reporter will go back and read it.

Q. 16. You don't recall hearing him testify to that?

A. Not to that.

Q. 17. You were not there on this Saturday when McGlothlin brought his truck there on this occasion at all?

A. No, sir.

page 197 } Q. 18. You don't know what the arrangements were?

A. No, sir.

Q. 19. Or what took place?

A. No, sir.

Q. 20. Yet you attempt to tell the jury what the contract was between your company and McGlothlin?

A. No, sir.

By Judge Lively: That is unwarranted. He is not undertaking to tell them that.

By the Court: In answering the hypothetical question he said: If he remembered the question the answer was no.

By Mr. Gillespie: I also remember, if my memory serves me correctly, Judge Lively asked this witness if Mr. Mundy has express authority from his company to deliver this McGlothlin truck and the answer was no.

By Judge Lively: I think he did state that.

Q. 21. Is that true? Was that the question asked you a minutes ago by Judge Lively and was that answer given?

A. Would you state the question.

Q. 22. Did Judge Lively ask you on direct examination if Charles Mundy had any express authority to deliver this McGlothlin truck to the C. & S. Service Station and did you reply no?

Charles D. Mundy.

Q. 30. Was there any body else working there at the plant that day?

A. No, sir.

Q. 31. Was Mr. Johnson working there that day?

A. No, sir. He was there that morning.

page 201 } Q. 32. He was there that morning. Did he help do any part of the work in extending this truck bed?

A. No, sir.

Q. 33. Or any one else other than you do any work on extending that truck bed for that particular job?

A. No, sir.

Q. 34. How long did you work on the bed that day, Mr. Mundy?

A. I worked up until it was after dark.

Q. 35. Was any one else at the plant after Mr. Johnson left at noon?

A. Mr. McGlothlin came down.

Q. 36. What time did he come down?

A. I don't know exactly what time it was. It was dark when he got there.

Q. 37. That was September the first, and it was already dark when he came?

A. Yes, sir.

J. 38. Did you have any conversation with him at that time about the work on this truck bed?

A. I did.

Q. 39. Detail that to the Court and jury.

A. Well, I saw that I could not get the truck done that night and I told Mr. McGlothlin I would not finish it, and he told me he was leaving Sunday morning about 4:00 o'clock going to Darlington, South Carolina for the Labor Day races, that it would be all right if I would finish it on Sunday morning, and then take the truck to C. & S. Service Station to get it serviced ready for work when he got back.

page 202 } Q. 40. Did you have any express authority from your employer, Hayes Richlands Metal Products, to deliver that truck anywhere after the work on it was completed?

A. No, sir.

Q. 41. If you had no authority from your employer to deliver that truck after the work on it was completed, why did you do so.

A. Well, Mr. McGlothlin asked me to.

Q. 42. How long had you known Mr. McGlothlin?

Charles D. Mundy.

A. Yes, sir.

Q. 13. Are you acquainted with Henry Macil McGlothlin?

A. Yes, sir.

Q. 14. I will ask you whether or not on the first of September, 1956 he brought a truck to the plant of Hayes Richlands Metal Products Incorporated?

A. Yes, sir, he did.

Q. 15. For what did he bring the truck there?

A. To have the body extended to balance the load.

Q. 16. What kind of a truck was it?

A. It was a GMC tandem.

Q. 17. Do you recall how much extension he wanted put in there?

A. I don't remember. It was around eight or nine inches. Just enough to counter the weight.

Q. 18. Did you put that extension in for him?

A. Yes, sir.

Q. 19. What size bed did that make on that truck, Mr. Mundy?

A. It made close to fifteen feet.

Q. 20. And what would be its capacity?

page 200 } A. Around fifteen tons.

Q. 21. Fifteen tons?

A. Yes, sir.

Q. 22. You mean the bed would hold fifteen tons of coal?

A. Yes, sir.

Q. 23. With whom did Mr. McGlothlin make the arrangements for having this work done?

A. With Mr. Johnson.

Q. 24. Do you know when he made the arrangements with Mr. Johnson?

A. On Friday.

Q. 25. Was Mr. Johnson there on Saturday when the truck was brought in?

A. Yes, sir.

Q. 26. Do you recall what part of the day it was that it was brought in?

A. Between 8:00 and 8:30.

Q. 27. On Saturday morning?

A. Yes, sir.

Q. 28. Was Mr. Johnson there Saturday morning?

A. Yes, sir.

Q. 29. How long did he stay?

A. Not very long. I don't know exactly how long.

Charles D. Mundy.

Q. 59. You say you worked four hours on Sunday, from 8:00 to 12:00 o'clock noon?

A. Yes, sir.

page 204 } Q. 60. Did you turn in your time to your employer for that morning's work?

A. I did.

Q. 61. And for what amount of time did you turn in?

A. I turned in four hours.

Q. 62. Four hours. You were paid by your employer for the four hours work from 8:00 to 12:00 o'clock?

A. I was.

Q. 63. Now, after you had completed this job and after you had locked up the shop you started to deliver the truck to the C. & S. Service Station as you have testified?

A. Yes, sir.

Q. 64. Now, as you approached the C. & S. Service Station coming from Richlands, what side of the highway is that on?

A. Coming from Richlands it is on the South side.

Q. 65. Coming from Richlands which side, your left or right hand side?

A. Your right.

Q. 66. I say coming from *Richalnds.*

A. Oh! The Texaco Service Station is on your left.

Q. 67. What kind of a service station is on the right?

A. Esso.

Q. 68. Now, as you were approaching the C. & S. Service Station what did you do, sir?

A. When I go up to about Lowe's Drive In or between Lowe's Drive In and Lowe's Esso station I turned on my signal light and approached where I was going to turn off.

Q. 69. What signal did you give?

page 205 } A. I give an electrical turn signal. I pulled it down for a left turn.

Q. 70. A left hand turn?

A. Yes, sir.

Q. 71. You say that is an electrical directional signal?

A. Yes, sir.

Q. 72. It is operated from where?

A. The steering column, under the steering wheel.

Q. 73. Is it a type of electrical directional signal approved by the State Police?

A. Yes, sir.

Q. 74. Was it operating that day?

A. Yes, sir.

Q. 75. And you say that you turned that on along about

Charles D. Mundy.

A. Well, I knew of him—I don't know—for a number of years. I met Mr. McGlothlin when we opened the shop in Richlands.

Q. 43. Was he accustomed to hanging around there quite a bit?

A. We did all of his work for him on his bodies and his hoists.

Q. 44. Was that frequently?

A. No, not frequently.

Q. 45. Did you ever deliver any trucks for him prior to this occasion?

A. No, sir.

Q. 46. Did you ever deliver any trucks for any of the customers prior to this occasion?

A. Not without authority from Mr. Johnson, and they were for dealers.

Q. 47. They were for dealers?

A. Yes, sir.

Q. 48. New trucks?

A. New trucks.

page 203 } Q. 49. Did you have any authority from Mr. Johnson to deliver this particular truck?

A. No, sir.

Q. 50. When did you complete the work on this job, Mr. Mundy?

A. Around noon on Sunday.

Q. 51. What time did you go to work on Sunday?

A. It was 8:00 o'clock.

Q. 52. And how long did you work on Sunday?

A. I worked four hours.

Q. 53. Four hours. And you completed the job about noon?

A. Yes, sir.

Q. 54. Twelve o'clock. Then what did you do, sir?

A. I closed the shop and started to C. & S. Service Station with the truck.

Q. 55. And where is that located?

A. That is located between Cedar Bluff and Richlands on Route No. 460.

Q. 56. And why were you starting with the truck to the C. & S. Service Station?

A. To get it serviced.

Q. 57. For whom?

A. Macil McGlothlin.

Q. 58. At whose request?

A. Mr. McGlothlin.

the Lowe Drive In, or between the Lowe Drive In and the Lowe Esso Service Station?

A. I did.

Q. 76. Have you measured the distance from a point in the highway between Lowe's Restaurant and Lowe's Esso Service Station?

A. I have.

Q. 77. To the place of turning into the intersection at the C. & S. Service Station?

A. Yes, sir.

Q. 78. You measured that how?

A. With a tape.

Q. 79. And what is its distance?

A. Two hundred feet.

page 206 } Q. 80. Then is it your statement that this signal was on for a total of two hundred feet before you started to make the left hand turn?

A. It is.

Q. 81. As you proceeded from the point that you first turned on the directional signal two hundred feet to the point you started to turn into the driveway of the C. & S. Service Station, was that signal light operating the entire distance?

A. It was.

Q. 82. Was it still operating when you were actually turning in?

A. It was.

Q. 83. Now, after you turned the signal light on indicating a left hand turn, tell the jury exactly what you did, Mr. Mundy?

A. As I got close to my approach I got over to the center of the road next to the white line on my side of the road and put the truck in fourth gear, and I looked in the mirror and there was no cars behind me and I looked ahead and there was no cars whatsoever coming, and I slowed down to about twenty miles an hour.

Q. 84 Are you positive there were no cars approaching toward you from the East?

A. I am positive.

Q. 85. Then, what did you do, Mr. Mundy?

A. Well, I let the truck get down to a lower rate of speed, no more than ten miles an hour, and started making my turn.

page 207 } There is a drainage ditch there that is deep and with an empty truck it would give you a pretty good bump if you went through it fast.

Q. 86. Do you mean the concrete gutter there?

Charles D. Mundy.

A. Yes, sir.

Q. 87. At the time you started making your turn across the road approximately what rate of speed were you traveling?

A. Not over ten miles an hour.

Q. 88. Did you, at any time, stop that truck before you made the turn into the driveway of the C. & S. Service Station?

A. I did not.

Q. 89. You are positive of that?

A. I am positive.

Q. 90. Now, I believe beyond Wimpy Jones restaurant the highway sort of comes to a crest and goes off to the right?

A. Yes, sir.

Q. 91. Before you reach Wimpy Jones restaurant is the highway level?

A. No, sir, it is up a small grade.

Q. 92. Up a smal grade?

A. Yes, sir.

Q. 83. Where does that grade begin, Mr. Mundy?

A. Well, actually it begins coming out of Richlands; after you come out of Richlands two hundred yards it leads off to where you turn down in the old Cedar Bluff road and then it starts up grade again. You have a continuous grade there to beyond Wimpy Jones.

Q. 94. Along by the Lowe Service Station and the C. & S. Service Station would you state approximately
page 208 } what percentage of grade that is?

A. A three or four percent grade.

Q. 95. Now, from the point where you started to make your turn into the driveway of the C. & S. Service Station, have you made any measurements as to how far you can see from the position you were in there in the road, East, from that point?

A. Yes, sir.

Q. 96. And how did you measure that?

A. With a tape.

Q. 97. And what is the exact measurement as you measured it?

A. Five hundred eighty-eight feet.

Q. 98. Now, after you had done all you testified to and did start to make a turn—left turn across the highway, tell the jury just exactly what you did and what happened.

A. Just before I started to make my turn I looked up the road again to make sure there was nothing coming, and there was still nothing behind me, I saw I could make my turn in

Charles D. Mundy.

A. The left front side.
Q. 112. The left front—
A. Fender.
Q. 113. What part of your truck was struck?
A. The left front fender and the grille.
Q. 114. Was there any damage at all to the right side of the grille?
A. No, sir.
Q. 115. Not any damage to the right fender?
A. No, sir.
Q. 116. What part of the Honaker car was damaged?
A. The left side.
Q. 117. Now, after the impact what happened to your truck?
A. Well, it just stopped me, stopped me dead when he hit me.
Q. 118. Did you progress any further forward at all?
A. No, sir. I got out of the truck.
Q. You got out of the truck?
A. Yes, sir.
Q. 120. How far had you progressed at the time of this impact?
A. I had the two front wheels up through the
page 211 } gutter going into C. & S.
Q. 121. Going into the C. & S. Filling Station?
A. Yes, sir.
Q. After the impact where were your front wheels?
A. One wheel was still up on the concrete and the other one was in the gutter.
Q. 123. How did you get back in the gutter?
A. He knocked me back.
Q. 124. He knocked you back?
A. Yes, sir.
Q. 125. And was that the position it was in at the time Trooper Gallimore came there to make an investigation?
A. Yes, sir, it was.
Q. 126. What happened to the Honaker car after the collision?
A. It spun a half turn to the right and settled in the Piggly-Wiggly parking lot.
Q. 127. And headed in what direction?
A. Back toward Cedar Bluff.
Q. 128. And how far was it from the front of your truck when it came to a stop?
A. Around fifty feet.

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safety—when I thought I could—I started making my turn across the road, and just as I got into the drain ditch I heard tires a-crying and looked up and here come this automobile at me sideways.

Q. 99. When you say "this automobile", what automobile are you referring to?

A. The '55 Pontiac.

Q. 100. Is that the one that was being operated by J. E. Honaker?

A. It was.

page 209 } Q. 101. You say it was coming toward you sideways?

A. At an angle.

Q. 102 } At an angle?

A. Yes, sir.

Q. 103. In what other position was it going? Were the wheels rolling or what?

A. I don't think the wheels could be rolling. I heard them crying and he left tire marks. They were frozen, the brakes were.

Q. 104. How was he coming at you?

A. He was headed at an angle like about—I would say—maybe a thirty degree angle.

Q. 105. Which part of his car was toward, or closest to you?

A. The front end. The left hand front end.

Q. 106. And what was the nature of his speed?

A. Well, I could not say; I could not judge that. He was just coming at me,—it was pretty fast.

Q. 107. When you heard the tire crying as you turned in and you looked up and saw this car coming at you sideways, as you have testified above, how far was it away from you at that time?

A. Well, I could not say—I would say around one hundred fifty feet.

Q. 108. Around one hundred fifty feet?

A. Something like that.

Q. 109. Did he continue to slide sideways until his car made an impact with your truck?

A. He slid sideways until he went up over the

page 210 } sidewalk, and then I don't know what happened.

Q. 110. Turning in there as you were, Mr. Mundy, was any part of your truck close to the service station, or protruded further North?

A. Yes, sir.

Q. 111. Which part?

there was anything I could do, could I notify his wife or go get her, and he said she had already been notified and some boys were bringing her over.

Q. 140. At the time of this accident, Mr. Mundy, did you know J. E. Honaker?

A. I did not.

Q. 141. I will ask you whether or not, when you went to the hospital to see Mr. Honaker, he recognized or knew you?

A. He did.

Q. 142. In what way did he recognize you, sir?

A. He said: You are the boy that was driving the truck, Charley Mundy?

Q. 143. Did he call you by name?

A. He did.

Q. 144. Was that before anything was said about the accident?

A. Yes, sir.

Q. 145. When did he make that remark to you?

A. When I walked up to him and asked him how he was getting along.

Q. 146. Who was present there at that time, Mr. Mundy?

A. My brother-in-law, Sergeant Rasnick.

page 215 } Q. 147. Did you have any further conversation there with Mr. Honaker?

A. No, sir, not after I asked him if I could call his wife.

Q. 148. And did you later see him that day?

A. Yes, sir.

Q. 149. What time?

A. It was between 3:00 and 4:00 o'clock.

Q. 150. And where did you see him then?

A. I saw him in a room in the hospital.

Q. 151. All right. Did you have a conversation with him then?

A. I did.

Q. 152. What was the nature of that conversation?

A. Well, he introduced me to his wife and I believe it was to his son. There was two or three other men in the room at the time. I stood by the side of his bed. He told me not to feel bad about it, the wreck was not my fault, it could not be helped.

Q. 153. Did he say anything about the way he was driving?

A. Well, I—I don't remember.

Q. 154. Were his wife and son in the room that he was in when you were introduced

A. Yes, sir.

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Q. 129. After the collision what did you do?

A. I got out of the truck and went to Mr. Honaker's car and looked in and saw that they were seriously injured, and Mr. Nicholson, the son, was running around the car asking for some body to help, and I run to the C. & S. Filling Station and called the ambulance. The girl that answered the telephone said they had already—were already on their page 212 } way, and I went there and when I got out there one ambulance was already there.

Q. 130. Did you remain there until all the injured had been evacuated?

A. I did.

Q. 131. I believe you stated you were there when Trooper Gallimore came there?

A. I was.

Q. 132. You gave him a report of the accident?

A. I did. I got in the car with him.

Q. 133. Now, after Mr. Gallimore had completed his investigation what did you do?

A. I got in the car with my brother-in-law,—he came along.

Q. 134. Who is your brother-in-law?

A. Sergeant N. C. Rasnick.

Q. 135. All right.

A. He took me to the Clinch Valley Clinic to see Mr. Honaker.

Q. 136. Did you see Mr. Honaker there?

A. I did.

Q. 137. Where?

A. In the hall outside the emergency room, lying on a stretcher.

Q. 138. Did you have any conversation with Mr. Honaker?

A. I did.

Q. 139. Tell the jury and Court what that conversation was?

* * * * *

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* * * * *

A. He was laying out in the hall and I asked him—I told him first—I told him I was sorry and asked how bad he was hurt. He said: I will mark it. Don't worry about it, it was not your fault. It was just one of those things. And I asked him if

went? I mean by that was it level, sloping, even or unevern or how?

A. It was fairly level.

Q. 171. Fairly level?

A. Yes, sir.

Q. 172. Has the surface of that area been changed from the date of this accident to the present time?

A. It has.

Q. 173. In what way?

A. It has been asphalted.

Q. 174. It now has an asphalt surface?

A. Yes, sir.

Q. 175. Mr. Mundy, you mentioned about the skid marks from the Honaker car continuing down the highway from the point of beginning to where they went up over the sidewalk. Was that at the point of collision or not?

A. No, sir.

page 218 } Q. 176. Now, how far below where they went upon the sidewalk—How far beyond that was your truck when it was hit?

A. I could not say exactly how far it was, because I could not say.

Q. 177. In other words, the skid marks did not continue all the way down to your truck?

A. No, sir.

Q. 178. And the car was already up over the sidewalk and out of the paved portion—surface of the road before the collision?

A. Yes, sir.

Q. 179. When you first saw the Honaker car approaching, were its head lights on?

A. No, sir.

Q. 180. When you first saw or before you saw the car, or at the time you saw it before the collision, did you hear a siren blowing?

A. No, sir.

Q. 181. Did you hear a siren after the collision?

Q. 182. How soon after the collision?

A. Well, just as soon as it happened I heard the siren.

Q. 183. Have you made an actual measurement of the surface of the highway there at the intersection, the West intersection into the C. & S. Service Station?

A. The width.

Q. 184. The width of the highway?

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Q. 155. Mr. Mundy, you mentioned the skid marks that were made by Mr. Honaker's car as it was sliding into you, I believe you estimated about one hundred fifty feet.

page 216 } A. Yes, sir.

Q. 156. Did you later go out and measure those skid marks?

A. No, sir.

Q. 157. Did you go back after the accident and look at them?

A. Yes, sir.

Q. 158. Did you step them off?

A. Yes, sir.

Q. 159. Did you look as to the location of the place of beginning of those skid marks?

A. Yes, sir.

Q. 160. And where did those skid marks begin?

A. About five or ten feet East of Wimpy Jones.

Q. 161. Which way, East or West?

A. East.

Q. 162. You mean back toward Cedar Bluff?

A. Back toward Cedar Bluff.

Q. 163. You mean East of Wimpy Jones?

A. Yes, sir. They were pretty close—even with the East side of Wimpy Jones' restaurant.

Q. 164. On which side is that?

A. That is the side toward Cedar Bluff.

Q. 165. Did you see where those skid marks led to?

A. Yes, sir.

Q. 166. And where did they go to?

A. They went up over the sidewalk just at the intersection into the C. & S. Service Station.

Q. 167. Were there any marks on the gravel driveway of the Piggly-Wiggly parking lot?

page 217 } A. Yes, sir.

Q. 168. When you say these marks—skid marks continued on until they went over the sidewalk at the C. & S. Service Station, you mean the wheels of the car went up over the sidewalk?

A. Yes, sir.

Q. 169. Now, after you get beyond the curb and gutter and sidewalk and the concrete portion of the sidewalk, which constitutes the entrance into the C. & S. Service Station, what was the nature of the surface beyond there?

A. It was gravel.

Q. 170. What was the nature of that area there in which he

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Q. 198. Do you think any part of your truck was extending over the white line into the South lane?
A. No, sir.

* * * * *

CROSS EXAMINATION.

By Mr. Gillespie:
Q. 1. Mr. Mundy, I believe you say you were the installation foreman of the Hayes Richlands Metal Products Company—
page 221 } A. Yes, sir.
Q. 2. At the time of this accident?
A. Yes, sir.
Q. 3. And that you had on previous occasions made some deliveries of vehicles which had been brought there for work, but not without authority from Mr. Johnson?
A. Yes, sir,—not without authority.
Q. 4. Well, no one had ever requested that a vehicle be delivered that Mr. Johnson had ever refused, that you know of?
A. Not that I know of, no, sir.
Q. 5. And when a request was made why Mr. Johnson would get you or one of the other boys there to comply with the request and deliver the truck?
A. Yes, sir.
Q. 6. Now, you say that on the Saturday evening, about dark, when Mr. McGlothlin came back there and talked to you, you then told him that you would not be able to finish it that day as you had previously thought?
A. That is right.
Q. 7. And then he told you to go ahead and finish it the next day, and you agreed to do that work on Saturday and finish it the next day, and when you got through to take it up to the C. & S. Texaco Service Station for servicing?
A. That is right.
Q. 8. And that is what you were doing when this accident happened?
A. Yes, sir.
Q. 9. Now, you say that when you got up there,
page 222 } as you approached this intersection leading into the Texaco Service Station, approximately two hundred feet West of there, you turned on your left directional signal light?
A. Yes, sir.

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A. Yes, sir.

page 219 } Q. 185. What is that width?

A. Exactly thirty-one feet.

Q. 186. Is that from the South edge of the highway to the curb on the North? Is that to the curb on the North?

A. That is to the curb, yes, sir.

Q. 187. That is the entire distance there?

A. Yes, sir.

Q. 188. That includes the gutter?

A. Yes, sir.

Q. 189. How wide is the gutter?

A. Around twelve to thirteen inches.

Q. 190. Could you explain to us, if you know, how it happened that the left hand side of the Honaker car hit the left hand front and side of your truck?

A. Well, I didn't know until yesterday.

By Mr. Gillespie: If he didn't know when the thing happened, he had no way of finding out yesterday. We certainly object to the answer.

A. Mr. Honaker said yesterday how it happened, and I am going by what he said is the only way I know.

Q. 191. And what was your understanding from that?

A. He said when he went up over the sidewalk the right tire —right tire blew out and pulled his car into me.

Q. 192. Now, after the accident, Mr. Mundy, did you have occasion to walk around the truck there and see its location in the road?

A. Well, I saw the location of the truck in the

page 220 } road, yes, sir.

Q. 193. I will ask you whether or not it was occupying both lanes or just—just exactly its location in the road?

A. No, sir, it was not occupying but one lane.

Q. 194. Which lane was that?

A. The North lane.

Q. 195. The North lane?

A. Yes, sir.

Q. 196. In the position in which it stopped it had cleared the South side or East lane?

A. Yes, sir. Traffic could go by.

Q. 197. Was traffic going by?

A. Yes, sir.

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would it not, that you would have to travel from the time you looked until you reached the other side?

A. I don't know how far it would have to be.

Q. 25. Is that approximately correct?

A. Approximately.

Q. 26. And then according to your version of how this accident occurred, while you were traveling twenty-three to twenty-five feet this Pontiac traveled five hun-
page 224 } dred eighty-eight feet, is that right?

A. That is right.

Q. 27. Don't you know that that car was approaching there all the time, if you had looked you could have seen it?

A. It was not there when I looked across the road when I made my left hand turn.

Q. 28. Don't you know that that car had to be there?

A. It was not there.

Q. 29. Then, according to your statement, your speed and the distance that you traveled, that car would have to travel nearly five hundred miles an hour to reach that point there by the time you reached it at the point of collision?

By Judge Lively: Objection. It is argument. The witness has not said anything to base any such argument upon.

The Court: The witness can say he does not know.

A. If he had to travel five hundred miles an hour to get there that is what he was doing.

Q. 30. Do you think there is an automobile made that will travel that fast?

A. No.

Q. 31. You want this jury to believe if that is a fact and thoroughly accurate, you expect this jury to believe that car traveled at that rate of speed to reach the point of collision at the same time you did?

A. I don't know how fast the automobile was going. I didn't see him until he was right on me.

Q. 32. If you had looked you could have seen
page 225 } the car there, because it just had to be there.

By Judge Lively: Objection.

By the Court: The objection is sustained.

To which ruling of the Court the plaintiff, by counsel, at the time excepted.

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Q. 10. At that time there was nothing ahead of you?
A. That is right.
Q. 11. And you proceded on up the highway approximately two hundred feet there, or perhaps a little less, and then slowed down to make your left turn into the driveway?
A. That is right.
Q. 12. And you say just before you left the East bound traffic lane you looked again?
A. Yes, sir.
Q. 13. And there was nothing either to the front or back of you?
A. That is right.
Q. 14. You could see five hundred eighty-eight feet?
A. Yes, sir.
Q. 15. You had a clear and unobstructed view for five hundred eighty-eight feet?
A. Yes, sir.
Q. 16. At that time?
A. At that time.
Q. 17. You tell the jury you looked?
A. I did.
Q. 18. You were right up along-side the white line on your side of the road?
A. Yes, sir.
page 223 } Q. 19. Then you started across the highway?
A. Right after I looked.
Q. 20. Right after you looked you started across the highway?
A. Yes, sir.
Q. 21. You said that highway, which you measured, was thirty-one feet wide?
A. That is right.
Q. 22. Then you had to travel the distance of approximately fifteen and one-half feet to sixteen feet to reach the North side of the highway?
A. I went in at an angle.
Q. 23. You went in at an angle. We will say eighteen feet, then?
A. Well, you would have to turn the truck awfully sharp to go across eighteen feet. I say I went in at more of a forty-five degree angle.
Q. 24. A forty-five degree angle, and your right angle would be fifteen and one-half feet to go in at a forty-five degree angle, and that would be about twenty-three feet, then,

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A. I was in the gutter, right up on the concrete going into the filling station.

Q. 44. You mean to tell this jury when you looked you could see five hundred eighty-eight feet and by the time you got into the gutter that car had traveled four hundred thirty-eight feet, or had gotten to a point only one hundred fifty feet away from you when you saw it?

A. That is right.

Q. 45. And during the time it was traveling that distance of four hundred thirty-eight feet you never did see it?

A. No, sir.

Q. 46. Now, you say that the truck had a bed
page 227 } that was fifteen feet long?

A. Yes, sir.

Q. 47. When you got through with the bed?

A. Yes, sir.

Q. 48. And then in addition to that length you had the cab and the motor?

A. That is right.

Q. 49. So it would have been at least twenty-one feet long, would it not?

A. Yes, sir.

Q. 50. And that twenty-one feet was stretched out across the West bound traffic lane over which Honaker's car was traveling?

A. Yes, sir.

Q. 51. I believe you also stated, Mr. Mundy, that you didn't see any lights on the Honaker car?

A. No, sir.

Q. 52. And you didn't hear any siren until after the collision, then you did hear the siren?

A. That is right.

Q. 53. What was your attention directed to that you didn't see or hear anything that would have enabled you to stay on your side of the road until that car passed?

By Judge Lively: That is objected to. It is argument.

Which objection the Court overruled, to which ruling the defendants, by counsel, excepted.

By Judge Lively: It assumes matters that the
page 228 } witness has not stated—shown by the evidence.

A. My attention was on making my turn and getting into the C. & S. Service Station.

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By Judge Lively: It is repetition.

Q. 33. You say you were traveling at ten miles an hour approximately when you crossed the highway?
A. Approximately.
Q. 34. It is not a fact that according to the statute of Virginia, that an automobile traveling ten miles an hour will travel 14.67 feet in a second?
A. I don't know whether that is right or not.
Q. 35. And if you travel twice that number of feet, or twenty-nine feet, to travel the distance which you were traveling at ten miles an hour, it would take you two seconds to have driven your truck from the East bound traffic lane over into the intersection where the collision took place?
A. I don't know how long it took me.
Q. 36. Did you also know that a vehicle traveling at one hundred miles an hour would only travel 146.6 feet per second.
A. No, sir, I didn't know that.
Q. 37. And yet you could see up this road for five hundred eighty-eight feet?

By Judge Lively: Objection for the reason he has stated that.
By the Court: He has already stated that.

page 226 } Q. 38. If you divide 146.6 feet into five hundred eighty-eight feet you come up with four and a fraction, don't you?
A. I imagine so.
Q. 39. And you multiply that by one hundred and you get over four hundred miles an hour. That is simple arithmetic, is it not?
A. That is simple arithmetic, yes, sir.
Q. 40. Yet you tell this jury that car was not in the highway, coming down toward you from the direction of Cedar Bluff?
A. Not when I looked.
Q. 41. When you drove across that highway?
A. No, sir.
Q. 42. It didn't drop out of the sky, did it?
A. No, sir.
Q. 43. How far were you across that highway when you saw it one hundred fifty feet away from you, skidding sideways at a thirty degree angle as you describe it?

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Q. 54. What did you have your mind on anyway?
A. Driving.
Q. 55. But you don't remember hearing that siren at all until after the accident occurred?
A. That is right.
Q. 56. You do remember it then?
A. I do.
Q. 57. You don't remember seeing the car, with or without lights, until it was one hundred fifty feet away from you?
A. That is right.
Q. 58. And then you, at that time, were going across its lane of travel?
A. I was across it.
Q. 59. You were crossing it?
A. I was.
Q. 60. You say the left front fender and grille of the truck was the part damaged?
A. Yes, sir.
Q. 61. And the left side of the car?
A. That is right.
Q. 62. And the left side of that car was pushed in like this picture shows?
A. Just like the picture, yes, sir.
Q. 63. And in spite of the fact Mr. Honaker
page 229 } left the road on his side, run across the sidewalk, trying to get out of your way, you continued—

By Judge Lively: This is objected to because it is argumentative.

Q. To drive that truck into the side of the car and cause this accident, didn't you?

By Judge Lively: There is another objection to that. The plaintiff in this case has alleged, himself, that they ran into the truck.
By the Court: This witness is on cross examination. Go ahead and answer the question.

A. Would you ask that again.

The foregoing question: And in spite of the fact Mr. Honaker left the road on his side, run across the sidewalk, trying to get out of your way, you continued to drive that truck into the side of the car and cause this accident, didn't you? Was

read as reported.

A. No, sir, I didn't. I didn't drive into the side of the car.
Q. 65. Did you ever make any effort to stop your truck?
A. I don't remember. It all happened so fast.
Q. 66. You were there driving?
A. I was driving, yes, sir.
Q. 67. And you say you would not be going over ten miles an hour?
A. That is right.
Q. 68. Did this truck have proper brakes on it?
A. Yes, sir.
page 230 } Q. 69. Don't you know even on level ground that a truck can be stopped at ten miles an hour in braking distance of seven feet?
A. I guess it could. I don't know what I did.
Q. 70. You don't know what you did?
A. No, sir, not when I looked up and saw him coming. I didn't know what I did when I looked up and saw Mr. Honaker coming at me.
Q. 71. So far as you know you made no effort to stop at all, applying the brakes or anything else?
A. I don't know.
Q. 72. Had you ever met Mr. Honaker before that day?
A. No, sir.
Q. 73. And you tell this jury when you went down to the hospital after this accident that he called you by name?
A. He did.
Q. 74. Said it was not your fault?
A. He did.
Q. 75. Not to worry about it?
A. He did.
Q. 76. Do you know what kind of physical condition Mr. Honaker was in when you were talking to him down there at the hospital?
A. No, sir.
Q. 77. Whether he was in a state of shock?
A. I don't know, sir.
Q. Whether he had had any shots?
A. I don't know.
page 231 } Q. 79. Of mor*hp*ine or anything of the kind?
A. I don't know.
Q. 80. But you are sure he called you by name?
A. I am positive.
Q. 81. Now, up there at the accident you didn't go up to his

W. E. Fields.

A. Yes, sir.
Q. 13. Sitting on your porch?
A. Yes, sir.
Q. What were you doing there on the front porch, sir?
A. I was just out there, just sitting there.
Q. 15. Immediately before the accident occurred were you looking in any particular direction?
page 233 } A. Yes, I was looking in that direction, North.
Q. 16. Looking North?
A. Yes, sir.
Q. 17. And when you say "in that direction" are you referring—
A. In the direction of where the accident happened,—in that direction.
Q. 18. Could you see the place of that accident from where you were sitting on your front porch?
A. Yes, sir.
Q. 19. Can you see the place where the accident occurred now?
A. No, sir.
Q. 20. Why?
A. There has been a fill made there since.
Q. 21. Was there a fill there at the time of the accident?
A. No, sir.
Q. 22. Now, what was the width of the shoulder of the highway on the South side of the highway?
A. At that particular point?
Q. 23. At that particular point. That was back—September 2, 1956?
A. Approximately five feet I would think. I never measured it. Approximately five feet.
Q. 24. Was that a level shoulder, level with the surface of the road?
A. It was a little bit lower than the surface of the road; maybe two inches lower than the width—the drain off.
Q. 25. How much of a fill has been put in
page 234 } there?
A. At that particular place the fill is approximately one hundred twenty feet.
Q. 26. What?
A. About one hundred twenty feet at that particular place.
Q. 27. Now, instead of that being a five foot shoulder it is about one hundred twenty-five feet across there?
A. The fill part, I judge, is about one hundred twenty-five

car and tell him your name and that you were the driver of this truck, did you?

A. No, sir.

Q. 82. But when he called you by name he was still there on a stretcher outside the emergency room?

A. That is right.

W. E. FIELDS,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Shufflebarger:

Q. 1. What is your name, sir?

A. W. E. Fields.

Q. 2. Where do you live?

A. I live above the highway between Richlands and Cedar Bluff in the Cedar Bluff corporation.

Q. 3. Where is that with reference to Wimpy Jones' restaurant?

A. South, South of Wimpy Jones.

Q. 4. I believe that is within what is called the Cochran Addition and your house is on the street that runs down West of Wimpy Jones' restaurant?

page 232

A. Yes, sir.

Q. 5. Is that also close to the C. & S. Service Station?

A. Yes, sir.

Q. 6. Were you living there on September 2, 1956?

A. Yes, sir.

Q. 7. Were you, at that time, chief of police for the town of Cedar Bluff?

A. No, I was a deputy at that time.

Q. 8. Deputy?

A. Yes, sir.

Q. 9. You were a law enforcement officer in this county at that time?

A. Yes, sir.

Q. 10. Did you see the accident that occurred on September 2nd, 1956, between a truck operated by Charles Mundy and a car driven by J. E. Honaker?

A. Yes, sir.

Q. 11. Where were you, Mr. Fields?

A. I was at the house, sitting on the porch.

Q. 12. At your home?

Joseph Beavers

Q. 44. Did you go up to the scene of the accident after the impact?

A. Yes, sir.

page 236 } Q. 45. Could you state to the jury the approximate location of that truck with reference to the curb and gutter on the North of the center line of the highway?

A. The traffic was blocked up there, I was police at Cedar Bluff at that time, and I went up to help move the traffic around the South end.

Q. 46. Where was the rear of that truck with reference to the center line?

A. The rear end was right close to the center line in the road. There was room for it to pass behind. There was not passing room—there was room for them to go behind it.

Q. 47. If the rear end of the truck was approximately at the center line, the entire South lane was clear?

By Mr. Gillespie: Objection to leading the witness.

By the Court: Don't lead the witness.

Q. 48. Was any part of that truck projecting over the center line on the South side.

A. I didn't pay that much attention. I could not say about that.

Q. 49. You did direct traffic back and forth behind the truck?

A. Yes, sir.

* * * * *

page 237 } JOSEPH BEAVERS,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Shufflbarger:

Q. Is your name Joseph Beavers?

A. Yes, sir.

Q. 2. Where do you live?

A. Swords Creek.

Q. Where do you work?

A. Piggly-Wiggly.

W. E. Fields.

feet. Of course, that does not include the five feet of the shoulder.

Q. 28. I believe that has been made into a parking lot?

A. Yes, sir.

Q. 29. That is now paved?

A. Yes, sir.

Q. 30. And you stated that fill now practically blocks your entire view of the service station from your home?

A. Standing on the porch you can only see about two feet of it down from the top of the service station at this time.

Q. 31. At the time of the accident could you see the highway?

A. Yes, sir, I could see the South edge of the highway.

Q. 32. Could you see cars traveling on that highway?

A. Yes, sir.

Q. 33. Did you see the truck that was being operated by Charles Mundy?

A. Yes, sir.

Q. 34. Did you see it before the impact?

page 235 } A. Well, yes, I seen it start across—turning left —yes,—making a left turn North.

Q. 35. Was his truck stopped or moving at that time?

A. The best I could tell it was moving.

Q. 36. Did it continue to move on until the impact?

A. I could not exactly say about that.

Q. 37. How fast was he going?

A. He was going slow.

Q. 38. Going slow?

A. Yes, sir.

Q. 39. And at the time you saw him he was in the position to be turning North across the highway?

A. Turning left, North. Yes, sir.

Q. 40. At the time you saw the truck did you also see the car that collided with the truck?

A. I seen the car about the time of the collision there. I glimpsed the car about the time they got together.

Q. 41. Could you tell, or estimate, how fast the car was going?

A. No, sir, I could not.

Q. 42. Before the impact, Mr. Fields, did you hear a siren blowing?

A. No, I didn't hear a siren

Q. 43. After the impact did you hear a siren?

A. Yes, sir, I did.

Joseph Beavers

Q. 19. In other words, you had your foot up in the seat looking straight out the window?

page 239 } A. That is right.

Q. 20. Did you see the J. E. Honaker car go by Wimpy Jones there before the collision?

A. Yes, sir.

Q. 21. Was that while you were looking out the window?

A. That is right.

Q. 22. Was there anything about it that attracted your attention.

A. Yes, sir, the speed.

Q. 23. The speed. What speed was it making?

A. I would say seventy-five—eighty miles an hour—an hour,—a fast rate of speed.

Q. 24. And that was the speed you estimated he was traveling when he passed by Wimpy Jones place?

A. Yes, sir.

Q. 25. Did you hear a siren blowing?

A. Not until the crash happened.

Q. 26. Not until the crash happened?

A. Yes, sir.

Q. 27. I believe that crash happened down below Wimpy Jones, diagonally across the road?

A. Yes, sir.

Q. 28. Did you see the crash?

A. No.

Q. 29. Why?

A. I was not looking that way.

Q. Was there anything than would prevent your looking down that way?

page 240 } A. I don't know whether there would be or not.

Q. 31. You didn't follow it as it went on down out of sight?

A. No, sir.

Q. 32. And you didn't hear a siren blowing?

A. No, sir.

Q. 33. Did you observe any lights burning on the Honaker car?

A. No, I didn't.

Q. 34. But you say you did hear a siren after the collision?

A. Yes, sir.

Q. 35. Was the door open there into the Wimpy Jones Restaurant?

A. It was broad open.

Q. 36. You were sitting in the booth next to the door?

A. Yes, sir.

Joseph Beavers

By Mr. Gillespie:
Q. 4. At Richlands?
A. Piggly-Wiggly store in Swords Creek.

By Mr. Shufflebarger:
Q. 5. Were you in the Richlands area on Sunday, September 2, 1956?
A. Yes. I was at Wimpy Jones Restaurant.
Q. 6. Were you at the Wimpy Jones Restaurant at the time of the accident between the truck driven by Charles Mundy and the car operated by J. E. Honaker?
A. Yes, sir, that is right.
Q. Where were you siting?
A. I was sitting right in back of the door, right inside the door there at the windows of the restaurant.
Q. 7. What were you doing there?
A. I was waiting for my dinner to be served.
Q. 8. Were you sitting in the first booth inside the door?
A. Yes, sir.
page 238 } Q. 9. Is that on the right or left of the door as you go in?
A. It is on the right.
Q. 10. As you enter the restaurant where is the booth?
A. Well, it is—as you enter it would be on the left side of the restaurant.
Q. 11. And you were in that first booth?
A. Yes, sir.
Q. 12. By booth, that means a table with two benches, one bench on either side?
A. That is right.
Q. Did the back of one of those benches face toward Richlands?
A. Yes, sir.
Q. 14. Did the back of the other side face toward Cedar Bluff?
A. Yes, sir.
Q. 15. Which one were you sitting in?
A. With the back facing Cedar Bluff.
Q. 16. With the back facing Cedar Bluff?
A. Yes, sir.
Q. 17. Were you sitting square in that seat?
A. I was sitting sideways.
Q. 18. How were you sitting?
A. I had my knee up in the seat facing straight out.

Joseph Beavers

A. That is right.

Q. 13. Yet you tell the jury you can estimate the speed of seventy-five to eighty miles an hour?

A. Facing speed, any body can do that. You see a lot of cars speeding. I seen it all my life.

Q. 14. Oh, you can, for a matter of less than one hundred fifty feet?

A. That is right.

RE-DIRECT EXAMINATION.

By Mr. Shufflebarger:

Q. 1. Could you see that car proceeding for at least one hundred fifty feet along the highway in front of you?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Gillespie:

Q. 1. Didn't you say the collision was not more than one hundred fifty feet to two hundred feet and you didn't even watch it?

A. I didn't watch it all the way. He said: Could I have seen, is the way I understood him.

Q. 2. You didn't see it, and observing it that far you base your estimate of speed on the distance of less than one hundred fifty feet of observation on this particular occasion, that is a fact, is it not? If you watched it that total distance you would have seen it collide, would you not?

A. I don't know whether I would have or not.

page 243 } Q. 3. If it was not any further than that down to where the collision took place, you would be bound to have seen it?

A. I didn't say, for sure, how far I had seen it.

Q. 4. You were sitting there in Wimpy Jones Restaurant?

A. Yes.

Q. 5. You knew where the accident took place?

A. Yes, sir.

Q. 6. You saw it as it passed by Wimpy's and you didn't follow the traveling of that car any further? You didn't follow it all the way to the point of collision at all?

A. That is right.

Q. 7. In the few feet you observed it you estimate the speed as you gave to this jury?

A. It was a very fast speed.

Joseph Beavers

CROSS EXAMINATION.

By Mr. Gillespie:

Q. 1. Your back was toward Cedar Bluff?

A. No, sir. The back of the seat was toward Cedar Bluff. I was sitting sideways in the seat.

Q. 2. You are the same Joseph Beavers that testified before, are you not?

A. Yes, sir.

Q. 3. At that time were you asked the question "You were sitting on the one with your back turned toward Cedar Bluff?"

A. The back of the seat was toward Cedar Bluff. I had my knee up in the seat, looking straight out.

page 241 } Q. 4. You were not sitting on the bench that would have had to face in the direction of Cedar Bluff?

A. No.

Q. 5. You were sitting on the bench that would ordinarily have to face towards Richlands?

A. Yes, sir.

Q. 6. You say you had your foot up, looking straight out?

A. Yes, sir.

Q. 7. You had your foot up this way and looking straight out that way, over your right shoulder?

A. I was looking out over my right shoulder into the highway.

Q. 8. You would have to be looking over your right shoulder to have seen straight out the window. That is the way you were sitting, like I am, with your foot up in the seat, with your right shoulder toward the highway?

A. I was looking the same way as I am sitting here. I had my knee up in the seat, looking straight out, like I would be right here, into the highway.

Q. 9. This place where you were sitting is about one hundred fifty to two hundred feet from the place where the collision took place?

A. I would say so.

Q. 10. You didn't actually see the collision, did you?

A. No, sir.

Q. 11. So, then, you saw this car as it passed by from the window?

A. Yes, sir.

page 242 } Q. 12. You didn't even follow it all the way down to where the collision took place?

Max Smith.

DIRECT EXAMINATION.

By Judge Lively:

page 245 } Q. 1. Your name is Max Smith?

A. Yes, sir.

Q. 2. Where do you live?

A. Richlands.

Q. 3. Whose son are you?

A. Jeff Smith's.

Q. 4. What do you do?

A. Work at a service station.

Q. 5. The service station referred to in this record as the C. & S. Texaco Service Station?

A. Yes.

Q. 6. Were you working there on September 2, 1956?

A. What day is that?

Q. 7. September 2, 1956?

A. Was that on a Sunday that the wreck happened?

Q. 8. Yes.

A. Yes, sir.

Q. 9. You were working there at that time. How close is this filling station to the road, about how close?

A. About one hundred to one hundred twenty-five feet.

Q. 10. How do you get into the filling station?

A. Turn off the road there.

Q. 11. I mean do you have entrances or walks, or how do you get into it?

A. You have turn offs there from the highway.

Q. 12. I hand you a map which has been introduced in evidence—a copy which has been made by a surveyor. Now, assuming that this figure here is the filling sta-

page 246 } tion, what are these spaces?

A. These?

Q. 13. These blank spaces here?

A. They are turn offs.

Q. 14. Entrances?

A. Yes.

Q. 15. You come off the highway by an entrance to the East and one to the West?

A. Yes, sir.

Q. 16. What is the nature of the highway there with reference to being level, or does it slope from the filling station either way or one way? Just tell us about that.

A. What do you mean, the highway or the drive?

Q. 17. I mean the highway.

RE-DIRECT EXAMINATION.

By Mr. Shufflebarger:

Q. 1. The front of Wimpy Jones Restaurant is parallel with the highway?

A. Yes, sir.

Q. 2. It sits back fifty to sixty feet from the highway?

A. Yes, sir.

Q. 3. Is the front of the restaurant glass?

A. Yes, sir.

Q. 4. Looking right straight out, could you look to the right and see up the road toward Cedar Bluff?

A. If I had been looking.

Q. 5. In your position—

page 244 } By Mr. Gillespie: Objection to this line of examination. We are not interested in what he could have done. We are interested in what he did.

By Mr. Shufflebarger: I asked him the question on re-direct examination, if he did see it as much as one hundred fifty feet, and he said he did.

By the Court: I understood he said he could have. Let's get to the facts, what he did, not what he might have done.

Q. 6. You were looking out at the highway?

A. Yes, sir.

Q. 7. Looking straight out at the highway?

A. Yes, sir.

Q. 8. While you were looking out this car went by?

A. Yes, sir.

Q. 9. You judged the speed from what you observed as it went by?

By Mr. Gillespie: He is leading this witness. It is his witness.

By Mr. Shufflebarger: That is all. I think it is clear what he saw.

• • • • •

MAX SMITH,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

Max Smith.

A. He was on his side.

Q. 34. And how was it approaching the point opposite the filling station there? I mean was it driving straight ahead or was it sliding or how was it coming?

A. It was beginning to slide.

Q. 35. Beginning to slide when you first saw it?

A. Yes, sir.

Q. 36. Did you see it on to the place where the collision took place?

A. I didn't see the actual collision.

Q. 37. You didn't see the collision. Why?

A. The truck blocked my view where we was washing.

Q. 38. Do you drive a car and know about the speeds of cars?

A. Yes, sir.

Q. 39. How long have you been driving?

A. About two and one-half years, or three.

Q. 40. From your observation of this car at this time that you saw it, what speed was it making from the point where you saw it on into the place of collision?

A. About seventy or seventy-five.

Q. 41. You mean at the rate of seventy or seventy-five miles an hour?

A. Yes, sir.

Q. 42. Did you notice whether or not this car of Mr. *Hoanker* had its lights on?

A. I didn't see any.

page 249 } Q. 43. You didn't see any lights?

A. No, sir.

Q. 44. Did you hear any siren up to the time of this collision?

A. No, sir.

Q. 45. Did you hear one after the collision?

A. Yes, sir.

Q. 46. Was this place where you were in washing the car, was it closed or in an open place?

A. It was open.

Q. 47. Did you notice where the truck stopped after the collision?

A. Notice?

Q. 48. Notice where it stopped. Did it stop in the driveway of the filling station or in the highway?

A. It stopped right where you come in the drive.

Q. 49. Right in the intersection of the driveway with the highway, that is where it was when you saw it?

Max Smith.

A. What do you mean, which way?
Q. 18. Both ways.
A. I don't understand what you mean.
Q. 19. Is the highway level along there about the filling station or does it slope one way or the other?
A. It is up the hill.
Q. 20. Toward where?
A. Toward Cedar Bluff.
Q. 21. What about from the other direction, as you approach the place where the filling station is?
A. It is down hill.
Q. 22. For how far?
A. How far?
Q. 23. How far is it down hill?
page 247 } A. The highway?
Q. 24. Yes.
A. As far as you can see I reckon.
Q. 25. Now, what about the land as you go from the highway into the filling station, is that level, up grade or down grade?
A. It is down grade to the road.
Q. 26. Down grade from the filling station to the road. Were you in the filling station on the day that this accident happened?
A. Yes, sir.
Q. 27. Where were you?
A. In the wash room.
Q. 28. Did you notice this truck that was being driven by Mr. Mundy? This car that was being driven by Mr. Honaker and the truck being driven by Mr. Mundy?
A. Somebody said something about the car.

By Mr. Gillespie: We object to what somebody said.

A. Somebody said something and I looked up and seen the car.
Q. 29. You looked up?
A. Yes, sir.
Q. 30. What did you see?
A. I seen the car.
Q. 31. You mean the Honaker car?
A. Yes, sir.
Q. 32. And what direction was it coming from?
A. From Cedar Bluff.
page 248 } Q. 33. Whereabouts in the road was it, if it was in the road at the time you saw it?

A. Yes, sir.
Q. 50. You don't know whether it was knocked back any or not?
A. No, sir.
Q. 51. Or at the same place of the collision?
A. No, sir.
Q. 52. Did you notice the truck after the collision?
A. Yes, sir.
Q. 53. Where was the contact, or evidence of collision, on the truck?
page 250 } A. On the left fender.
Q. 54. On the left fender of the truck?
A. Yes.
Q. 55. Front or back fender?
A. Front.
Q. 56. On the left front fender of the truck?
A. Yes, sir.

CROSS EXAMINATION.

By Mr. Gillespie:
Q. 1. You say you were in the wash room of the C. & S. Texaco Service Station?
A. Yes, sir.
Q. 2. You were washing a truck?
A. Yes, sir.
Q. 3. That truck had been pulled in head first into the wash room?
A. Yes, sir.
Q. 4. You were at the front of the truck?
A. Yes, sir.
Q. 5. And there is a high concrete wall on the left as you stand facing the front of the truck?
A. It is about three and one-half to four feet high.
Q. 6. You say when you first saw the car it was already skidding, trying to get out of the road over in the area there at the service station?
A. It was beginning to skid.
Q. 7. It was beginning to skid. You could not see it all the way to the point of collision?
page 251 } A. No, sir.
Q. 8. Now you know that the skidding only started—You looked at the skid marks, didn't you?
A. Yes, sir.
Q. 9. Were you there when Trooper Gallimore stepped off

the distance between where the car came to rest and where the skid marks started?

A. When did he do that?

Q. 10. Right after the accident.

A. I was not down there to the car.

Q. 11. Do you know how long those skid marks were?

A. No, sir.

Q. 12. Do you know the distance between where the skid marks started and where the car came to rest?

A. No, sir.

Q. 13. Approximately one hundred fifty-seven feet?

A. I don't know.

Q. 14. And the car was about fifty feet from where the collision took place? Fifty feet away from the truck?

A. Something like that.

Q. 15. Something like that. So, then, if the car skidded approximately one hundred feet, you saw it for less than that distance, if you could not see it all the way to the point because your view was obstructed by this truck that you testified about, is that right?

A. How is that now?

Q. 16. You say the truck kept you from seeing the car at the time of the collision?

page 252 } A. That is right.

Q. 17. That obstructed your view?

A. Yes, sir.

Q. 18. And it had already started skidding when you first saw it?

A. Yes, just beginning.

Q. 19. So if it skidded for approximately one hundred feet before the collision took place, and you saw it after the skidding started, you could not see it up to the point of the collision, you saw it actually less than one hundred feet?

By Judge Lively: Objection because it is a misquotation. The plaintiff in this case has stated that this car skidded one hundred forty to one hundred fifty feet. Mr. Gillespie is talking about less than one hundred feet.

By the Court: The jury will remember what the distances are. Let the witness answer.

Q. 20. If that is a fact?

A. Yes, sir.

Q. 21. Then you saw it sliding less than one hundred feet?

A. Yes, sir.

Clinton Smith.

Q. 8. That is located between Cedar Bluff and Richlands, I believe?

A. Yes, sir.

Q 9. Do you remember the occasion on September 2, 1956 when there was a collision took place between a truck driven by Mr. Mundy and a car *drive* by Mr. Honaker over there?

A. Yes, sir.

Q. 10. Where were you at that time?

A. I was washing a truck in the wash room at the service station.

Q. 11. Who else was with you?

A. Max Smith and Raymond Jewell.

Q. 12. Did you see Mr. Honaker's car before the collision, as he was approaching the place of collision?

A. Yes, sir.

Q. 13. You saw it from in where you were washing the truck?

A. Yes, sir, within a limited space.

Q. 14. Have you driven automobiles and motor vehicles?

A. Yes, sir.

Q. 15. Are you able to judge the speed of motor cars?

A. I think so.

Q. 16. What, in your opinion was Mr. Honaker's car—At what rate of speed was he traveling from the time you saw him until the time of the collision?

A. I would say between seventy and eighty page 255 } miles an hour.

Q. 17. How old are you?

A. Seventeen.

Q. 18. What work do you do? What kind of work do you do?

A. General service station work.

Q. 19. Service station work?

A. Yes, sir.

Q. 20. Do you go to school?

A. Yes, sir.

Q. 21. What school do you go to?

A. Washington County Technical School at Abingdon.

Q. 22. How long have you been going over there?

A. Since September last year, this time.

CROSS EXAMINATION.

By Mr. Gillespie:

Q. 1. You say you are seventeen years old?

Clinton Smith.

By Judge Lively: Objection.

Which objection the Court overruled, to which ruling of the Court the defendants, by counsel, excepted.

Q. 22. On the basis of that short distance, when you were in the back end of the wash room, working on a truck, one hundred and some feet from the highway, you tell this jury that you estimate the speed to be from seventy page 253 } to seventy-five miles an hour?

A. Yes, sir.

Q. 23. You are a pretty good estimator of speed?

A. I don't know whether I am or not.

Q. 24. Yet you attempt to make that estimate of speed within a matter of less than one hundred foot visibility of the car, have you not?

A. Yes, sir, from a basis of my knowledge.

Q. 25. You say you have been driving about two and one-half years?

A. I don't know exactly how long.

* * * * *

CLINTON SMITH,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Judge Lively:

Q. 1. What is your name, sir?

A. Clinton Smith.

Q. 2. Whose son are you?

A. B. H. Smith's.

Q. 3. You are a son of B. H. Smith?

A. Yes, sir.

Q. 4. What relation are you to Max Smith?

A. He is my uncle.

Q. 5. Does your father own a filling station?

A. Yes, sir.

Q. 6. What filling station does he own?

page 254 } A. C. & S. Service Station.

Q. 7. C. & S. Service Station?

A. Yes, sir.

Clinton Smith.

Q. 22. You heard it skidding?
A. Yes, sir.
Q. 23. That is what caused you to look up?
A. No, you could look out. I happened to look out at the speed of the car.
Q. 24. Didn't you hear the siren?
A. The siren?
Q. 25. Yes.
A. No, sir.
Q. 26. Never did hear it?
A. I heard it after the crash.
Q. 27. That is not what attracted your attention?
A. What? The siren.
Q. 28. Yes.
A. No, sir.
Q. 29. Did you see the collision?
A. No, the way it was sliding it blocked the view.
Q. 30. There is a concrete wall to the left as you were standing facing the truck?
A. The wall is at the right.
Q. 31. The wall is to the left and right. The outside wall is to the right?
A. Yes.
Q. 32. There is a wall there separating the wash
page 258 } room from the grease rack?
A. Yes, sir.
Q. 33. And you were looking out between either the outside wall or the wall between the wash room and the grease rack and the truck?
A. I was looking out the wall between the truck—the truck —between the truck. It was not between the grease rack. The wall between the side of the truck.
Q. 34. Was that the wall between the wash room and grease rack?
A. No, sir.
Q. 35. Between the truck and outside wall?
A. Yes, sir.
Q. 36. You were down on the West side of the truck?
A. Yes, sir, I believe that would be the way.
Q. 37. You could not even see it at all?
A. There is a space there.
Q. 38. What kind of a truck was that?
A. It was a tandem.
Q. 39. A tandem truck?
A. Yes, sir.

Clinton Smith.

A. Yes.
Q. 2. How long have you been driving a car?
A. Two and one-half to three years.
Q. 3. You drove before you had a license, didn't you?
A. No, sir.
Q. 4. You are just seventeen now?
A. I will be eighteen the thirtieth of June.
Q. 5. You will be eighteen the thirtieth of June?
A. Yes, sir.
Q.6. And this happened over two years ago?
Q. 7. At the time you saw it had you gotten your license to drive?
A. Let's see. Yes, sir.
page 256 } Q. 8. This happened in September, 1956.
A. No, sir.
Q. 9. You had not gotten your driver's license at that time?
A. No, sir.
Q. 10. That is when you decided, in your own mind, about what the speed was?
A. Yes, sir.
Q. 11. And you say you were helping wash a truck?
A. Yes, sir.
Q. 12. You were in the wash room?
A. Yes, sir.
Q. 13. Where were you? Whereabouts in the wash room were you?
A. I was in the—let's see—it would be in the corner over there.
Q. 14. Next to Max?
A. Yes, we was all on one side.
Q. 15. You were all back in the back end?
A. Yes, sir.
Q. 16. The truck had been driven straight in, heading into the wash room?
A. Yes.
Q. 17. And you were all back there in the back end?
A. Yes, in front of the truck.
Q. 18. That would be in the back end of the wash room?
A. No, sir.
Q. 19. What was the car doing when you first saw it?
A. What was it doing?
page 257 } Q. 20. Yes.
A. It was just going.
Q. 21. Was it skidding?
A. Not when I first seen it. I heard it.

Norman C. Rasnick.

A. Yes, I did.

Q. 9. Did you notice the truck that had been in this collision that Mr. Mundy had been driving?

A. Yes, sir, I seen the truck. It was still sitting at the scene of the accident.

Q. 10. Did you notice whether the truck had been hit?

A. Yes, sir, the truck had been hit in the left front fender, say the center part of the left front fender,—from there back to the door on the driver's side, which was battered in considerably.

Q. 11. Where was this truck sitting?

A. This truck?

Q. 12. With reference to this entrance to the C. & S. filling station?

A. The front bumper of this truck was in the entrance—West—to this Texaco Service Station.

Q. 13. Just before he crossed, what you would say, the sidewalk.

A. The front end was about even with the sidewalk.

Q. 14. When you saw it?

A. Yes, sir.

Q. 15. And how was the truck sitting with reference to the road? Was it squarely across the road or sitting

page 261 } in the road at an angle?

A. The truck was sitting at an angle the best I remember, heading at about, what I would say, a forty-five degree angle to the Texaco Service Station off the main highway.

Q. 16. Did you go down to the hospital with your brother-in-law that afternoon?

A. Yes, sir, I did. Charley, after he was released from the investigation there at the scene of the accident, he asked me would I take him down to the hospital to see Mr. Honaker?

Q. 17. Did you have a car?

A. Yes, sir.

Q. 18. Did you take him?

A. Yes, sir, I did.

Q. 19. Did you see Mr. Honaker?

A. Yes, sir, I did.

Q. 20. What was his mental condition apparently? Was he rational or not, so far as you could tell?

A. He seemed as if he was in good condition at the time. I am not a Doctor, sir. I would say he was within good wits of himself.

Q. 40. And the only view that you got of this car was between the West wall, down toward Richlands, and the truck.

A. Well, I don't know about that. I could not say for sure.

Q. 41. Your view was limited, very limited, was it not?

A. Yes, sir, it was limited.

page 259 } Q. 42. Yet you try to tell this jury that that car was traveling seventy to seventy-five miles an hour?

A. I said seventy to eighty. I don't know.

Q. 43. Seventy to eighty miles an hour?

A. Yes, sir.

* * * * *

NORMAN C. RASNICK,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Judge Lively:

Q. 1. What is your name, sir?

A. Norman C. Rasnick.

Q. 2. You are a sergeant, I believe?

A. Technical sergeant in the U. S. Air Force.

Q. 3. Where are you located.

A. At Eglin Air Force Base in Florida. I been in the Air Force for sixteen and one-half years.

Q. 4. Do you know Mr. Mundy here?

A. Yes, sir.

Q. 5. Are you any relation to him?

A. He happens to be my brother-in-law.

Q. 6. He married your sister?

A. Yes, sir.

Q. 7. Where were you on September 2, 1956 at the time this collision took place between the truck driven by Mr. Mundy and the car driven by Mr. Honaker over there? Where were you at that time?

page 260 } A. The occasion I was in the Brittain Hotel in Richlands at the time of the accident. Approximately twenty-five minutes later I was at the scene of the accident. I was on my way to Cedar Bluff to visit my sister that afternoon.

Q. 8. Did you see Mr. Mundy there at the time?

the condition of Mr. Honaker was when you saw him on the stretcher in the hospital physically and mentally?

A. Well, not being a Doctor I would be afraid to say what his mental condition was. It appeared to me as if he was in fairly good condition and was talking with sense as much as I could remember.

Q. 2. You don't know whether he was in a state of shock or not?

A. That would not be for me to determine.

Q. 3. Do you know if any one had administered a shot of any type to him at that time?

A. No, sir, I do not.

Q. 4. Your statement was, I believe, that Charley Mundy walked in and spoke to him and called him J. E., is that right?

A. Right.

* * * * *

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* * * * *

JETTY PATTON,

another witness introduced on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Judge Lively:

Q. 1. You are Mrs. Jetty Patton?

A. Yes, sir.

Q. 2. Where do you live?

A. Lebanon.

Q. 3. Where are you employed?

A. Clinch Valley Clinic.

Q. 4. In what capacity are you employed?

A. Superintendent of nurses.

Q. 5. Do you know Mr. Honaker over there?

A. Yes, I do.

page 273 } Q. 6. Was he in your hospital, beginning on September 2, 1956 and for some time thereafter?

A. Yes, he was.

Q. 7. Did you have a talk with him soon after he was admitted to the hospital with reference to his injuries?

Norman C. Rasnick.

Q. 21. Did you and Mr. Mundy talk with him there at that time?

A. Yes, sir.

Q. 22. Did he know who Mr. Mundy was?

A. Yes, sir. Charley Mundy spoke to Mr. Honaker, called him by name. He said: How are you J. E.? He said: I am in pretty bad shape right now, I believe I will be
page 262 } all right.

Q. 23. Go ahead and tell any other conversation.

A. Well, Charley walked in and so, about the first thing he says to him—Any one called your wife? Or has any body gone for her, if not, I would like to go bring her over for you. Charley and I made the suggestion we would bring his family over if they needed to come over. And he said: No, they have already called my wife, she will be over here,—mentioning someone's name, I can't remember. I can't say who it was that was going to bring her over that afternoon.

Q. 24. All right. What else was said between them?

A. Well, Charley apologized. He said: I am sorry for what has happened. Mr. Honaker says: Charley, don't let it worry you, you did all you could do to keep from causing an accident. It is one of those things. I should not be driving like I was. It happened before I could realize what was going on. Told him not to worry about him, he would be all right. He didn't believe it was his fault.

Q. 25. Didn't believe it was whose fault?

A. Charley's fault.

Q. 26. Did you and Mr. Mundy go back to the hospital after that?

A. Yes, sir. Later on that afternoon, I say approximately between 3:00 or 4:00 o'clock after we first visited the hospital. Charley took a bath and cleaned up and went down between 3:00 and 4:00 o'clock to see Mr. Honaker again. His wife and son were present at that time, and Mr. Honaker made practically—made practically the same statement to Charley, —to not worry about him, he would be all right.
page 263 } He did all he could to keep from having an accident. He didn't believe it was his fault. He said: I don't think you have anything to worry about.

CROSS EXAMINATION.

By Mr. Proffitt:

Q. 1. Mr. Rasnick or Sergeant Rasnick, do you know what

Jetty Patton.

A. I don't—I don't know that Mr. Honaker was diagnosed as pneumonia after the accident.

Q. 6. You mean to tell the jury you don't know what his condition was on Tuesday after the accident when you claim you had a conversation with him?

A. I do not know that Mr. Honaker had pneumonia?

Q. 7. Were you his nurse?

A. I am superintendent of nurses. I am in charge of all the patients.

page 275 } Q. 8. Did you attend him any in your capacity as a nurse?

A. None other than visiting the patient.

Q. 9. As superintendent of nurses, don't you see the medical charts?

A. Occasionally I do. Critical patients I always see their charts.

Q. 10. You say you didn't see this man's chart and don't know he had pneumonia and was in rather acute condition there for several days?

A. No, sir.

By Judge Lively: She answered that several times that she didn't know whether he had pneumonia.

Q. 11. About three weeks after the accident did you have some more conversations with Mr. Honaker?

A. Yes.

Q. 12. On that occasion did you tell him that Charley Mundy had been worrying his mother a great deal, the way he was involved in accidents and the way he was driving and drinking?

A. I did not discuss—we never mentioned him after the first conversation with Mr. Honaker.

Q. 13. At that time you lived in Cedar Bluff and were pretty friendly with his mother?

A. They were next door neighbors.

Q. 14. You were a good friend of his mother?

A. Yes, sir.

Q. 15. You tell the jury that you didn't tell him that Charley Mundy had conducted himself in a way

page 276 } that was worrying his mother to death?

A. I did not.

By Judge Lively: She has answered that question. He puts the same question again.

A. Yes, I did.

Q. 8. At that time did he tell you that he had talked to Mr. Mundy?

A. Yes, he did.

Q. 9. The day before, I believe?

A. I don't remember if I talked to Mr. Honaker the day after the accident or on Tuesday after.

Q. 10. Anyhow at the time you had your interview with him he told you he had a talk with Mr. Mundy about this matter?

A. Yes, he did.

Q. 11. Did he tell you when it was that he had this talk, if you recall?

A. I don't remember when it was he told me.

Q. 12. That was Mr. Charley Mundy he was referring to?

A. Yes, it was.

Q. 13. Did he tell you at that time that he didn't know whose fault this accident was?

A. That is right. He said it happened so quickly that he didn't know.

Q. 14. Didn't know whose fault it was.

A. (No answer.)

CROSS EXAMINATION.

page 274 } By Mr. Gillespie:

Q. 1. Mrs. Patton, the day after he was admitted to the hospital Mr. Honaker got in a pretty serious condition with pneumonia and run a high temperature?

A. I don't know. That was Labor Day and I take Labor Days off.

Q. 2. His condition—his critical condition—acute condition continued for ten or twelve days after that?

A. We are not permitted to tell those things. The doctors have to do that.

Q. 3. You could tell what his physical condition was?

A. We are not to reveal any diagnosis on the patient. The doctors have to do that.

Q. 4. For your information the doctor has already testified about that, and I am going to insist you answer the question. We will let the Court decide whether you shall tell.

By the Court: Answer the question.

A. I don't know what his diagnosis was.

Q. 5. What?

seventy miles an hour to travel four hundred thirty-eight feet?

A. A little over four and one quarter seconds.

Q. 6. At seventy-five miles an hour a car travels 109.9 feet per second. How long would it take a car going at seventy-five miles an hour to go four hundred thirty-eight feet?

A. Slightly less than four seconds.

Q. 7. And eighty miles an hour a car travels 117.2 feet per second. How many seconds would it take a car going at that rate to travel four hundred thirty-eight feet?

A. Three and seven-tenth seconds.

page 278 } CROSS EXAMINATION.

By Mr. Gillespie:

Q. 1. You are familiar with this table set out in the Code there, are you, Mr. Bogardus?

A. I looked at it a few minutes ago.

Q. 2. And it is true that according to that Table a vehicle traveling ten miles an hour will travel 14.67 feet per second, just like I stated?

By Mr. Shufflebarger: There was no objection to Mr. Gillespie's examination and there has not been any evidence offered in contradiction to that.

Q. 3. That was a correct statement according to the Statute you have been examining and calculating from?

A. All those figures are mathamatical certainties.

Q. 4. It is true a truck traveling at a speed of ten miles an hour, the breaking distance, in order to stop, is seven feet, is that correct?

A. Right near the breaking—

Q. 5. Distance for trucks.

A. Yes, but the total stopping distance is sixteen feet from the Table.

Q. 6. That is for a car. That includes reaction time and breaking?

A. Yes, sir, certainly eighteen feet.

Q. 7. Now, for an automobile, according to this same Table you have been examining and calculating from, what is the total stopping distance for a car traveling fifty-
page 279 } five miles an hour, including reaction time?

A. According to the Table 216 feet.

By the Court: I think that she answered the question.

By Mr. Gillespie: I want to apologize for asking the question the second time.

RE-DIRECT EXAMINATION.

By Judge Lively:

Q. 1. I want to ask her one further question. I believe the Court has ruled that you can give your views about the condition of a person. I will get you to state whether, in your opinion and so far as you observed, Mr. Honaker was rational when he was talking to you?

A. Yes, I think he was at the time I talked to him.

* * * * *

B. P. BOGARDUS,

a witness having heretofore been introduced on behalf of the defendants, being recalled, testified as follows:

DIRECT EXAMINATION.

By Mr. Shufflebarger:

Q. 1. Mr. Bogardus, you are the same B. P. Bogardus who has testified previously in this case, I believe?

A. Yes, sir.

Q. 2. Mr. Bogardus, I will ask you whether or not you have made certain calculations based upon the Table page 277 } of Speeds set forth in the Code of Virginia, and quoted from it by Mr. Gillespie in his cross examination of Mr. Mundy?

A. I have.

Q. 3. According to the Table of Speeds, and I am referring to Code section 46-212.2 of the Code, an automobile traveling sixty miles an hour covers eighty-eight feet per second. How long would it take a car going at that rate of speed to travel four hundred thirty-eight feet?

A. Nearly five seconds.

Q. 4. At sixty-five miles an hour a car travels 95.3 feet per second. How many seconds would it require a car going at sixty-five miles an hour to travel four hundred thirty-eight feet?

A. Nearly 4.6 seconds.

Q. 5. At seventy miles an hour an automobile travels 102.6 feet per second. How long would it take a car traveling at

B. P. Bogardus.

Q. 7. Considerably more than one hundred fifty feet. I believe that is all I want to ask Mr. Bogardus.

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Outside the hearing of the jury.

By Judge Lively: If the Court please, before you go into the instructions offered on behalf of the defendants, the jury having had the view, we desire to renew our motion to strike the evidence in this case. The motion has already been stated.

We take the position that there is no negligence shown on the part of the defendants in this case, and even if it be conceded that there was negligence on the part of the defendants, the plaintiff is clearly guilty of contributory negligence of the grossest kind, which proximately caused—contributed to the injury.

In so far as the Hayes Richlands Metal Products Company is concerned there is no evidence warranting the submission to the jury of the question of the defendant Mundy's agency, or representing the other defendant in the case.

page 283 } Now, the second ground. The conduct of the plaintiff is clearly negligent, and it clearly contributed to the accident and the injury.

A man in the face of a signal that indicated to him, as he admits, that this man was going to make a left turn, the fact he also admits that the truck, which the defendant Mundy was driving, was right on the line of the highway, and that in spite of those things, without any change in that signal, instead of bringing his car under control he increased his speed and kept on increasing it according to his own testimony, and never, at no time, did he undertake to stop, and the car was completely out of his control. He could not drive it where he wanted to; he could not stop it when he wanted to, and it was, evidently, going at a terrific speed as shown by the physical facts in the case, regardless of the testimony. It skidded, according to his own testimony, sideways, with the wheels locked, a distance of one hundred forty or fifty feet, and then it had power enough to strike something hard enough, according to his testimony, to cause a tire to blow out

and this car to whip around the truck and run into the opposite side of the truck, then back off a distance of one hundred fifty feet before it stopped.

page 284 } Those things are in this case, and regardless of any other question they clearly show contributory negligence on the part of the plaintiff.

By Mr. Gillespie: I don't think counsel for the plaintiff would want to make any additional statement that has not been made at the time this motion was made at the conclusion of the plaintiff's evidence, except to say that we contend the negligence of the defendant and the contributory negligence of the plaintiff are questions of fact for the jury under the evidence in this case, and I think counsel for the defendants are losing sight of the fact that mere negligence will not always create actionable negligence, nor will it always create contributory negligence.

In order for negligence to create liability or bring into existence—the only contributory negligence which will relieve the defendants from liability either must be the proximate cause of the accident or a contributing cause.

Now, the law has defined proximate cause as that cause without which, notwithstanding all other causes, the occurrence would not have taken place.

We submit that, under the facts in this case, if this defendant Mundy had remained in the parked position which the testimony indicates he was in just before the

page 285 } accident for a period of two or three additional seconds the accident would never have occurred.

Section 46.1-206 of the Code, paragraph (b) provides: That a vehicle shall be driven as nearly as is practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement could be made with safety.

Contrary to the view of counsel for the defendants, we don't think that the mere giving of a directional signal can change the law in this respect.

And in construing this section of the Code and the following sections, The Supreme Court of Appeals, in the case of *Johnson* v. *Kellam,* 162 Virginia 757, held that the driver of an automobile who sees another car approaching from the opposite direction on the wrong side of the road has the right to assume that the driver of such automobile will observe the law and seasonally move over to his right side in order to permit safe passage.

Certainly if the driver of an automobile, who sees another car approaching from the opposite direction on the wrong

would hold that he was not guilty of contributory negligence that contributed to the accident.

There is two theories, the plaintiff's and the defendants.' Relying upon which theory the jury might believe, the verdict would necessarily follow.

page 291 } I will have to overrule the motion to strike the evidence.

By Judge Lively: We desire to except to the ruling of the Court.

* * * * *

Counsel for the plaintiff tendered to the Court and requested the Court to give to the jury nine certain instructions, in writing numbered one to eight-A, inclusive.

PLAINTIFF'S INSTRUCTION NO. 1.

By Judge Lively: I don't believe that is sufficient to negative contributory negligence. Instruction No. 1 is objected to because—

1. The question of agency is not dealt with in the instruction, and it directs a verdict for the plaintiff, which would mean a direction of the verdict upon a partial view of the evidence, and the expression "and that such failure on his part was the sole proximate cause of the accident." It is objected to because it is not a sufficient negation of contributory negligence.

2. Because there is no evidence to warrant the

page 292 } giving of this instruction, because the evidence shows that the action of Charles Mundy, however negligent it may have been, in so far as it tended to cause the slightest injury, was contributed to by the action of the plaintiff Honaker.

By Mr. Gillespie: Counsel for the plaintiff would like to amend Instruction No. 1 by adding, after the word "accident," in next to the last line the words "and that said Mundy was at the time the agent of Hayes Richlands Metal Products, Inc."

By Judge Lively: Instruction No. 1, so amended, is objected to for all the reasons set forth in the objection to the original instruction.

And further because there is no evidence in the case warranting an instruction, or submitting to the jury the question of the agency of Mundy. The evidence simply does not show it.

side of the road, has a right to assume that he will place himself within the provisions of the law.

page 286 } The driver who sees another vehicle approaching from the opposite direction, on his own side of the road, would have an even greater right to assume that such driver will not violate the law, but will remain in his own proper lane of traffic until the vehicle has passed.

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By the Court: I see you are reading from a brief that you have prepared in this Nicholson case. I imagine that is what it is and I imagine you could go on for several pages.

I think both of you have your grounds in the record. Let me say this: My theory is this is a jury question.

The plaintiff has testified he had his car under control and that when he was within one hundred fifty feet of this truck that it suddenly left a standing position and cut across in front of him. That, of course, created an emergency. Then, a lot of times when an emergency is created things do go out control. There was nothing, as I see it, in the plaintiff's action there that would have brought about an accident even at the speed he testified he was making if that road had remained clear.

page 290 } His testimony is that the truck was standing still as he approached it and it didn't turn into his lane of travel until he was in one hundred fifty feet of it. From his standpoint he had his car under complete control. If it went out of control it was when he was confronted with the emergency, and he hit his brakes.

I think it is purely a jury question.

I don't know whether the jury is going to believe that that is not a question of contributory negligence. I think if the jury believes the plaintiff's evidence, there is certainly evidence of the negligence of the defendant's truck driver.

I think there is evidence, if the jury wants to believe it, of tying Hayes Richlands Metal Products in under the agency or employee proposition.

If the jury wants to believe Honaker had his car under control, the accident resulted solely because the truck turned right in his face one hundred fifty feet away, I think that they

And further because the instruction is objectionable in that it does not require the acts of Mundy, constituting the alleged negligence, to have been in the course of his employment.

By Mr. Gillespie: If he was acting as their agent at the time of the accident, raises the presumption that page 293 } he was acting within the scope of his employment.

By Judge Lively: In answer to that, the facts with reference to his agency appears in the case, and there is no room for presumption.

By the Court: I am giving Instruction No. 1, as amended, as Instruction No. 1-A.

To which action and ruling of the Court the defendants, by counsel, at the time excepted.

By the Court: Instruction No. 1 was offered and you made your objection. Then he offered the same thing as Plaintiff's Instruction No. 1-A, with that interlineation, and it was thereupon marked amended and given as Instruction No. 1-A.

PLAINTIFF'S INSTRUCTION NO. 2.

By Judge Lively: I think that is a finding instruction and the duty engendered on the driver of the truck, was not the duty of keeping a reasonable lookout for other vehicles using the highway at the time and immediately preceding the time of the accident testified about in this case, but as provided by the Statute, and as stated in Instruction No. 1, page 294 } was to use reasonable and ordinary care to see that such movement could be made in safety.

The defendants also object to Instruction No. 2 for all the reasons set forth in the preceding objections to Instruction No. 1; that is, that there is no evidence warranting this instruction; that the question of contributory negligence is not properly negatived; that there is no evidence either showing that Mundy was the agent of Hayes Richlands Metal Products Company, nor that he was guilty of negligence which was the sole proximate cause of the alleged injury.

By Mr. Gillespie: We think Instruction No. 2 is proper, and borne out by the evidence. We think that his failure in that respect was the sole proximate cause.

By the Court: I think it is a question for the jury to determine if he did. I will give Instruction No. 2.

To which action and ruling of the Court the defendants, by counsel, at the time excepted.

page 295 } PLAINTIFF'S INSTRUCTION NO. 3.

By Judge Lively: I think that is a finding instruction and it does not negative contributory negligence of the plaintiff, is one objection.

Another is there is no evidence sufficient to warrant the submission of the question of agency of Mundy to the jury.

Nor is there any evidence sufficient to warrant the submission of the question to the jury of whether Mundy's alleged negligence was the sole cause of the alleged injury.

As heretofore stated, the evidence shows that the negligence of Honaker was, as we think, the proximate cause of the alleged injury, and certainly it was a proximate cause of the alleged injury.

By Mr. Gillespie: This Instruction No. 3 is based upon the case of *Gable* v. *Bengler,* 177 Virginia 641. All we are saying is what constitutes agency. If these things are true, then Hayes Richlands Metal Products, Incorporated would be liable for any negligence, if any, by Mundy.

page 296 } Counsel for the plaintiff moves the Court for leave to amend Plaintiff's Instruction No. 3, as offered, by adding after the word "truck" in the third line from the end of such instruction the words "was guilty of negligence which was the sole proximate cause of the injuries to the plaintiff, then his employer, Hayes Richlands Metal Products, Inc., would be liable for such negligence on the part of the said Mundy."

By the Court: Give me a carbon copy of Plaintiff's Instruction No. 3.

By Judge Lively: With reference to Plaintiff's Instruction No. 3-A, we rely on all the objections made to Plaintiff's Instruction No. 3.

And further because the instruction is general and does not indicate to the jury anything of what would take to be negligence or reasonable care, leaving to the discretion of the jury to make any negligence that they desire.

By the Court: Instruction No. 3, as amended, is given as Instruction No. 3-A.

To which action and ruling of the Court the defendants, by counsel, at the time excepted.

page 297 } PLAINTIFF'S INSTRUCTION NO. 4.

By Judge Lively: If the Court please, that raises a point that we have been trying to make in the trial of this case when the matter arose—opportunity arose.

This instruction, as we understand it, entirely mistakes the character of the case and the issues presented to the Court here.

No authority has been cited for this proposition, although counsel for the plaintiff say they have authorities.

But our authority as we have been able to investigate shows clearly that that proposition is applicable only in a case where the car is coming from a secondary road into a primary road, or a place of that character. It is not applicable—it has no application to the case where a party is proceeding along a primary road and decides to go across the primary road. In the first case control is required to stop. In the second case he is not required to stop.

In the first case the duties of the party, under such circumstances, coming into a primary road from a secondary road is clearly defined by Statute, as are the duties in a case such as this.

page 298 } A party is on a primary road and desires to go across the road to his left—Mr. Shufflebarger cited those sections of the Code to the Court, and we are prepared to hand them to the Court now.

The relative duties of the parties, under such circumstances are clearly set forth in the Statute.

In the first place the person who desires to turn left must use reasonable care to see that such left turn could be made in safety; then he must give a signal clearly visible to people, attracting their attention to his intention to so turn. After he has done that he must follow that signal. He must go according to the direction of that signal unless he changes it.

By the Court: You mean if a man turns on a signal light and drives along with a left-hand signal light turned on, that he must go on and turn left?

He has to use reasonable care to see if it can be done in safety. He can stop if he wants to and change his signal.

By Judge Lively: The other man, he has some duty. The first thing he must do is to bring his car under control and keep it under control to avoid a collision,—to avoid a collision brought about by a mistake of these signals.

By Mr. Gillespie: I would like to reply to that, if Judge Lively is through.

page 299 } We think this case is on all fours with the case of *Walker* v. *Croysen,* 168 Virginia 410, and contrary to counsels'—for the defendants—contention that was not a case where a car was turning out from a side road, but was exactly like the one at bar. In other words, the plaintiff was a guest in an automobile that collided with defendant's truck. The driver of the car was traveling in an easterly

direction, while the defendant was driving in a westerly direction on the same highway.

As in the case at bar, the defendant in the Walker case contended the automobile was approaching from the opposite direction at a terrific speed. The defendant, to enter the driveway—in order to do this—it was necessary to drive across the automobile's line of travel or wait until it had passed. The defendant chose to drive across the automobile's line of traffic, and after giving a signal to that effect proceeded across at a speed estimated at five or six miles an hour, and when the front end of the truck had entered the driveway—the truck leaving the road, the highway, the collision occurred.

It was in that case held that the defendant was guilty of negligence as a matter of law, which was either the sole proximate cause of the plaintiff's death, or sufficiently contributed to it.

page 300 } A collision could have been averted by him by the exercise of the slightest degree of care when the defendant saw the fast approaching car—the intervening distance between them, and a delay upon his part of a very short time would have permitted it to cross and averted the collision.

Now, if a person stopped upon a highway and about to turn to his left across the highway, can wait until a car approaching from the opposite direction is within one hundred fifty feet of him and pull across the lane of traffic which the approaching car is using and has a legal right to use, and then avoid liability because he had a signal light going or blinking, then the highways would be an absolute slaughter house.

This Walker case is absolutely on all fours with the case at bar.

By Judge Lively: I do not think the Walker case, as just stated by Mr. Gillespie, is in point at all.

In that case, according to his statement, I am not familiar with the case,—according to his statement this was a passenger—that was not the main highway and the Court used the expression there that it is in favor of the passenger, but it does not go the other step and say it would be in favor of the driver of the car.

By the Court: Let's pass Instruction No. 4 for

page 301 } the moment.

By Mr. Gillespie: We would like to refer the Court to Section 46-233 of the Code of Virginia.

By the Court: I will give Instruction No. 4 for the plaintiff, and I will refuse No. G.

By Judge Lively: Plaintiff's Instruction No. 4 is objected

to because it is in conflict with the law—the Statute—which has been cited to the Court, which requires a party to give a left-hand signal, use reasonable care to see that the left turn can be made. That requires him to make the left turn unless he gives a contrary signal, and requires the other approaching party, across whose lane he is to go, to keep his car under control and to avoid an accident.

This instruction is not based upon the statutory requirements for a left turn by a person who is traveling upon a highway at all.

It is also contrary to the facts of this case whether you believe what the defendant says that he looked up the road, he could see five or six hundred feet ahead of him and didn't see the plaintiff's car approaching, or whether you say that the car was within vision.

The evidence clearly shows wherever the car was, the defendant in this case had a right to reach the conclusion that the left turn could be made in safety.

page 302 } The *plaintiff's* own evidence shows that he was there. He watched this man as he come down the stretch five hundred eighty-eight feet, and he had plenty of time, according to his own testimony to have brought his car under control, and the defendant had every reason to assume that this left turn could be made in safety.

As shown in the Holtz case, which Mr. Shufflebarger cited, and I understand when he does that he has complied with the requirements of the law, and there is no reason at all to disregard the statutory requirements as to the duties of the parties on this occasion, and that imposes some duty that is not within the statute so far as we can see.

We except to the action of the Court in giving Plaintiff's Instruction No. 4, because it is highly prejudicial and contrary to the law.

By Mr. Shufflebarger: In connection with Plaintiff's Instruction No. 4. The giving of said Instruction No. 4 is further objected to, and we take exception to the Court giving it, because it is respectfully pointed out that Section 46-233 of the Code is of such a nature it does not make any difference whether a car is stopped or moving when a signal is given, because it states that every driver who intends to

page 303 } start, stop, turn or partially turn from a direct line, shall first see that movement can be made in safety and give the signal.

Under that section, even if the Mundy truck was stopped and he gave the signal as required by the section, then he complied with the law, and this instruction is absolutely in the face of that statute.

I would further say this: Looking at the evidence in this case Mr. Honaker, here, stated that when he come over the hill six or seven hundred feet away, which we say actually measured five hundred eighty-eight feet away, that he observed the truck, which, at that time, had the signal light on indicating to him a left turn. At that time he didn't know whether it was moving or stopped.

And further because of the fact he didn't know whether it was moving or stopped he continued to watch.

And when he determined by continuing to watch it whether or not it had stopped, he increased the speed of the car.

By Mr. Gillespie: When he had seen it did stop.

By Mr. Shufflebarker: He said he probably went one hundred fifty feet before he decided it was not moving.

Now, the testimony of Willard Nicholson, who
page 304 } was riding with him, was to the effect that he
didn't know whether it was stopped or moving,—
if it was moving it was moving awfully slow.

Even if the Mundy truck was stopped at the time he came over the hill five hundred eighty-eight feet away, he was giving this signal indicating he was going to make a turn to the left, which, under that section was all the law required him to do.

By Mr. Gillespie: According to your argument he can relieve himself of the obligation to see if he can make a movement to his left in safety by giving a signal to that effect. And we know good and well if that could be done with any safety at all, under the circumstances in this case, we would not be here today.

By Judge Lively: We think, under the facts in this case, as a matter of law, the defendant had a right to reach the conclusion he could make the turn in safety when he started giving this signal five hundred feet away.

By Mr. Shufflebarger: Since the Court has given Plaintiff's Instruction No. 4 we insist upon and think we are entitled to Instruction No. G.

By the Court: It is exactly the opposite. I could not give them both.

Instruction No. 4 for the plaintiff is given as
page 305 } offered.

By Judge Lively: The giving of Instruction No. 4 is contrary to the law, and it also amounts to an invasion of the province of the jury.

By the Court: It is a matter for the jury to determine whether or not Mundy reasonably believed he could make this left turn in safety.

Instruction No. 4 is given on behalf of the Plaintiff.

By Judge Lively: Instruction No. 4 is further objected to because it does not take into consideration the acts in the way of giving signals by the defendant Mundy as required by the statute.

And does not take into consideration the relative positions of the cars at the time of such alleged noticing or stopping of the truck, or the relative position of the car and truck at said time, and does not take into consideration the question of unlawful, negligent operation of the car by the plaintiff, and as heretofore pointed out, we do not think the instruction is made applicable to the Statute having to do with the traveling over secondary and primary roads.

page 306 } PLAINTIFF'S INSTRUCTION NO. 5.

By Mr. Shufflebarger: That instruction is objected to because, as I understand, the defense of sudden emergency is not applicable.

A man who is responsible or contributed to bringing the emergency on—

By Judge Lively: We want to give our objections.

Counsel for the defendants object to the giving of Instruction No. 5 because it is not applicable or proper under the evidence in this case.

Under the uncontradicted evidence the plaintiff Honaker was guilty of wrong doing in breaking the speed—in breaking the maximum speed laws and by driving his automobile upon the highway in such manner and at such speed to endanger the life, limb and property of people on the highway, and for such reason is not entitled to an instruction such as No. 5 there, which is only available to people who are without fault.

The plaintiff in this case—more specifically Honaker—disregarded the signal that was given him in this case, which he understood and he had plenty of time to have avoided the situation by complying with the Statute; that is, by keeping his automobile under control.

page 307 } By the Court: Given.

To which ruling and action of the Court the defendants, by counsel, at the time excepted.

By Mr. Gillespie: We contend that the emergency was not created by any speed of Honaker whether within the limits or beyond the limits.

The emergency was created by the defendant Mundy by pulling across the highway and blocking his lane of traffic

when the Honaker car was in such close proximity, as it was, he could not do anything to avoid the accident.

By Judge Lively: The plaintiff Honaker had ample warning of the purpose and the intention of the defendant and he understood—I say that he understood that the effect of this signal, that he saw, was that the truck was going to cross his lane of traffic.

By Mr. Gillespie: He said he was stopped and he assumed that he had stopped in order to permit him to pass and was going to stay stopped until he had passed.

By Judge Lively: The provisions of the Statute which we contend are violated by the giving of this instruction, in the amended Code are: 46.1-216; 46.1-217; 46.1-218; 46.1-233 and 46.1-234. The old Code—46-235; 46-236 and 46-219. Duty of Drivers.

page 308 } PLAINTIFF'S INSTRUCTION NO. 6.

By Judge Lively: That instruction is objected to

1. Because it is not a correct statement of the law applicable to this case.

2. Because of repetition. It directs in the beginning—in the fifth line from the top—recovery for mental anguish and then it directs the same recovery in a later division.

3. Because the instruction states and repeats the right of recovery for elements of damage or alleged damage which are not shown by the evidence and law in this case.

For instance the impairment of the nervous system. Not shown to be any impairment of health or bodily function.

It does not show he will be required to have any medical attention in the future.

It does not show any loss of earning capacity.

We submit, generally, it includes a number of elements of damage which the evidence does not sustain at all.

Some of which have been pointed out and others which appear in the instruction which are not supported by the evidence, and does not require any damage to be shown by evidence.

And for the further reason that the amount of Fifty thousand dollars is mentioned in this and that is the
page 309 } second mentioning of that. In the instruction it should not be mentioned at all.

By Mr. Gillespie: Counsel for the plaintiff think this instruction properly sets forth the measure of damages in this case as shown by the plaintiff's evidence, and wonders if it

would be possible for plaintiff to submit any instructions or perform any function in the trial of this case that would be proper.

By the Court: I am refusing Instruction No. 6 as offered and will give Instruction No. 6-A, amending in line three—in fixing his damages, take into consideration, so far as shown by a preponderance of the evidence. Of course, the burden is on the plaintiff to prove by a preponderance of the evidence.

By Mr. Gillespie: We have no objection to the amendment.

By the Court: Then after the word "functions" I have struck out "as have occurred or."

The hour of 5:30 o'clock p. m. having arrived, Court was adjourned until 9:30 o'clock tomorrow morning, March 12, 1959.

page 310 } Instruction No. 6-A offered on behalf of the plaintiff was re-written and given.

To which action and ruling of the Court the defendants, by counsel, at the time excepted.

PLAINTIFF'S INSTRUCTION NO. 7.

By Mr. Gillespie: I would like to offer two additional instructions on negligence and proximate cause.

By Judge Lively: I think Instruction No. 7, as a proposition of law, is correct.

Of course, we maintain our position that the plaintiff is not entitled to any instructions in this case, under the evidence.

By the Court: Given.

page 311 } PLAINTIFF'S INSTRUCTION NO. 8.

By Judge Lively: We object to Plaintiff's Instruction No. 8 for the same reasons heretofore assigned to the other instructions.

And we also think it is misleading to the jury, as it would, in effect, hold that only one person could be guilty of proximate cause.

There may be more than one proximate cause.

Our objection is that the instruction is not a correct definition of the law and not applicable to this case, and would indicate to the jury that there can be only one proximate cause

in the accident when there may be more than proximate cause.

Of course, the accident would not have happened if the defendant had not been in the road.

Thereupon the Instruction No. 8 was amended by the Court by adding the words "or them" after the word "him" and the words "or causes" after the word "accident.

By the Court: I will mark this instruction, as amended, as Instruction No. 8-A, and as given. And I will mark the one offered as Instruction No. 8.

To which action and ruling of the Court the defendants, by counsel, at the time excepted.

By Judge Lively: We object to this instruction
page 312 } because it is not a correct statement of the law, and because it is misleading to the jury.

As given the jury would apply it only to the defendant.

The defendant is not asking for any recovery against the plaintiff, and is not asking to hold the plaintiff liable for any amount, and the wording of the instruction indicates that it is available only to a person who is asking for a recovery.

* * * * *

page 315 } DEFENDANTS' INSTRUCTION NO. C.

By the Court: I am not going to pick out evidence and tell them what it is. You offered another instruction—if they believe he was exceeding fifty-five miles an hour he was guilty of negligence, and if such negligence contributed to the cause of the accident it would bar him from recovery, or words to that effect.

I will have to refuse Instruction No. C as offered.

By Judge Lively: Counsel for the defendant, excepts to the ruling of the Court in refusing to grant Instruction No. C.

Under the evidence in this case there is no conflict in the fact that he was exceeding fifty-five miles an hour. He admits it in his testimony, and all the other evidence is to that effect, and we feel we are entitled to an instruction, as a matter of law, by reason thereof he was guilty of negligence.

* * * * *

page 317 } DEFENDANTS' INSTRUCTION NO. E.

By the Court: You are having me tell them what the evidence is.

Refused.

To which ruling of the Court the defendants, by counsel, excepted.

By Judge Lively: Under the plaintiff's own testimony he saw the signal and had plenty of time to avoid the accident and bring his car under control. There is nothing in the evidence in conflict, and as a matter of law he was guilty of negligence for his failure to comply therewith.

* * * * *

page 321 } DEFENDANTS' INSTRUCTION NO. G.

By Mr. Gillespie: Counsel for the plaintiff objects to the granting of Defendants' Instruction No. G for the reason that that instruction is not applicable to the evidence in this case.

The instruction is based upon the Statute which prohibits the operator of a motor vehicle approaching a main highway from a secondary or side road from entering said main highway when there is traffic approaching within five hundred feet.

By Mr. Shufflebarger: The defendants insist that the instruction is proper, because it is based upon the Statute, I believe 46-235, which requires the driver to continue and not change his course after he has at once given a signal, unless he changes the signal in time to be seen.

It is based upon the evidence in the case as the plaintiff has contended. The plaintiff, himself, testified that even though he saw the signal and it indicated to him a left-hand turn he thought the man would stop and wait for him to go by.

He thought, in face of what the signal indicated and what he understood, and he had no right to do that in view of that signal which was given according to the Statute. He had no right to assume he was not going to make a left
page 322 } turn. If that signal was changed—if it was not changed, then Mundy was going to proceed to the left as the signal indicated and the law required him to do.

By Mr. Gillespie: If the Court please, the Statute requires the drivers of vehicles approaching each other from opposite directions to stay in their own traffic lane.

In this case the defendant Mundy was a man who was leaving a direct line of traffic, and it was he who was charged with the duty of seeing that it could be done in safety before moving out from a direct line of traffic.

In this case the plaintiff was maintaining his automobile in his own proper lane of traffic and was not making any movement out of that lane of traffic.

He had the right to assume that the vehicle approaching him from the opposite direction would do the same thing.

By the Court: Instruction No. G is refused.

The defendants, by counsel, except to the ruling of the Court in refusing to grant Instruction No. G.

By Mr. Shufflebarger: The Court has given Plaintiff's Instruction No. 4 and we think we are entitled to have Instruction No. G given and we insist upon it.

page 323 } By the Court: It is exactly the opposite. I could not give them both.

By Mr. Shufflebarger: We take exception, because it is absolutely in the face of the Statute.

DEFENDANTS INSTRUCTION NO. H.

By Mr. Gillespie: Counsel for the plaintiff objects to the granting of Defendants Instruction No. H because it is in conflict with other instructions already given.

And for the further reason that it would be misleading to the jury in that it tells them that Mundy had a right to assume something that was contrary to what he claims was apparent to him.

By Judge Lively: He is entitled to an instruction then. He did see the car before he started across.

By the Court: He said he didn't see the car until it was one hundred fifty feet from him; he didn't see the car until it was one hundred fifty feet from him. I think this instruction is based upon an erroneous evaluation of facts. I would have to refuse it.

To which action of the Court in refusing to grant Instruction No. H, the defendants, by counsel, at the time excepted.

* * * * *

page 326 } DEFENDANTS' INSTRUCTION NO. N.

By the Court: This instruction is covered by Instruction No. I already given.

I will have to refuse this instruction.

By Judge Lively: We except to the Court's refusal to give Instruction No. N offered on behalf of the defendants.

DEFENDANTS INSTRUCTION NO. O.

By Mr. Gillespie: Not only is that an improper statement of the law, but what that instruction attempts to cover has already been covered in Defendants' Instruction No. J.

By Judge Lively: That is *Brooks* v. *Huffman*, Southeastern 106 Second 631-36.

By the Court: Instruction No. O is refused.

To which action and ruling of the Court the defendants, by counsel, at the time excepted.

page 327 } DEFENDANTS INSTRUCTION NO. P.

By Mr. Gillespie: That covers the same situation that the Court has already passed on in refusing a similar instruction.

It conflicts with Plaintiff's Instruction No. 4 and is contrary to the law of the case.

By the Court: Instruction P, as offered, I will have to refuse.

The defendants, by counsel, excepted to the ruling of the Court in refusing to grant Defendants' Instruction No. P.

By Mr. Shufflebarger: We would like to reoffer Instruction No. P, saying he had the right to presume any one using the highway.

DEFENDANTS' INSTRUCTION NO. Q.

No objection.

Given.

page 328 } DEFENDANTS INSTRUCTION NO. R.

Refused.

The defendants, by counsel, excepts to the ruling of the Court in refusing to give Defendants Instruction No. 5.

DEFENDANTS' INSTRUCTION NO. S.

Refused.

The defendants, by counsel, excepts to the ruling of the Court in refusing to give Defendants' Instruction No. S.

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page 329 }

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DEFENDANTS' INSTRUCTION NO. U.

By the Court: That instruction is covered by Instruction No. F, so I will have to refuse No. U. That is stated in a little different manner.

To which action and ruling of the Court in refusing to give Defendants' Instruction No. U the defendants, by counsel, at the time excepted.

DEFENDANTS' INSTRUCTION NO. V.

By the Court: I think you have it covered under Instruction No. F. Refused.

To which action and ruling of the Court the defendants, by counsel, excepted.

page 330 } DEFENDANTS INSTRUCTION NO. W.

By the Court: This is covered, I think, under Instruction No. F. You are having me say here that he turned to the left, which is not right.
I will have to refuse Instruction No. W.

To which ruling of the Court the defendants, by counsel, at the time excepted.

* * * * *

DEFENDANTS INSTRUCTION NO. Y.

By the Court: It looks like Instruction No. Y is covered by Instruction No. X, and Instruction No. X was given.

Refused.

To which ruling of the Court the defendants, by counsel, at the time excepted.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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